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WM. R. STANS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 312

GEORGE FORD, GEORGE HARRIS, J. EVELYN, VINCENT QUARTARARO, CHARLES H. BELANGER, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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THE UNITED STATES OF AMERICA, *Respondent,*

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONERS

STATEMENT OF THE CASE

This case is here on writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment of that court which affirmed a judgment of the Southern Division of the District Court of the United States for the Northern

District of California, convicting the petitioners, defendants below, of conspiracy.

The opinion of the Circuit Court of Appeals in the case will be found in the Record at page 840, and it is reported in 10 Federal Reporter, 2d series, page 339.

The petitioners will hereinafter in this brief be referred to as the defendants.

The defendants, Ford, Harris, Evelyn, Quartararo and Belanger, were indicted, with fifty-five others, in the Southern Division of the District Court of the United States for the Northern District of California for the crime of conspiracy to violate the "National Prohibition Act" and the treaty between the United States and Great Britain of May 22, 1924, and to violate the "Tariff Act of 1922" and the treaty between the United States and Great Britain of May 22, 1924, by means of the alleged transportation and importation into the United States of intoxicating liquors. (R. 5-19.)

The conspiracy was alleged to have been formed by the defendants and certain other persons in the district and division in which the indictment was found, and in the indictment it was alleged that the conspiracy was in operation between January 1, 1924, and the date of the indictment on November 20, 1924. And four overt acts in furtherance of the conspiracy were alleged in substance as follows:

> (a) That the steamship *Quadra* was loaded at Vancouver, B. C., in September, 1924, with 12,000 cases of liquor which were carried to a point near the Farallone Islands, where a portion of the cargo was transferred to motor boats named which carried the liquor into the United States.

(b) That on the 29th of September the *Quadra* delivered a barrel containing one hundred gallons of whiskey to the motor boat *903 B* which transported the whiskey to San Francisco.

(c) That on the 11th of October the *Quadra* delivered to the same motor boat a named quantity of alcohol, gin, brandy, whiskey and vermouth which was transported to San Francisco.

(d) That on the 12th day of October the *Quadra* delivered to the defendants Pensotti and McKenzie on the motor boat *C-55* eighty-nine sacks of whiskey and one case of beer which the said defendants attempted to transport into San Francisco Bay. It is charged that this delivery was made near the Farallone Islands and at a less distance therefrom than could be traversed by the *Quadra* and the *C-55* in an hour. (R. 13-17.)

Ford, Harris and Evelyn were the master and first and second officers, respectively, of the steamship *Quadra*.

The *Quadra* was a ship of British registry and these men were and are now British nationals. The *Quadra* was seized according to the Government nearly six miles away from the coast of the United States and it is not contended that either the ship or Ford, Harris or Evelyn were ever within the territorial waters of the United States.

Quartararo and Belanger are alleged to have been parties to the alleged conspiracy charged in the indictment while they were domiciled in or sojourning in San Francisco, the evidence offered by the Government being for the purpose of showing that they participated therein by arranging for the delivery of liquor from the *Quadra* and other ships on the

high seas to Oakland Creek and other points in San Francisco Bay.

At the trial important questions arose relating to the so-called rum treaty between the United States and Great Britain, to the defect in the indictment upon which the defendants were tried, to the scope of the jurisdiction of courts of the United States under Section 37, of the Criminal Code, and to the admission of irrelevant and incompetent evidence offered by the Government.

These questions will be treated in sequence in the argument herein and the appropriate assignments of error and record references will be there set out.

SPECIFICATION OF ERRORS

The errors relied upon in praying for a reversal of the judgment against these defendants may be concisely stated as follows:

(1) The District Court erred in attempting to exercise jurisdiction over the persons of the defendants, Ford, Harris and Evelyn, (British subjects brought into this country as an incident of the seizure of a British vessel beyond the territorial waters of the United States in accordance with the treaty with Great Britain of May 22, 1924) in violation of the said defendants' right secured to them by virtue of said treaty. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

(2) The District Court erred in permitting any of these five defendants to be convicted upon the indictment in the present case which properly

construed did not charge an offense against the United States. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

(3) The District Court erred in not directing a verdict in favor of the defendants, Ford, Harris and Evelyn, when the evidence adduced by the Government showed beyond question that they had at no time been nor had any of their conduct taken effect at any place within the scope of Section 37 of the Criminal Code, and that they, therefore, had not violated that statute. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

(4) The District Court erred in admitting in evidence cargo and papers from the British vessel *Quadra* obtained by a seizure by the United States in the absence of any proof that the said vessel had been lawfully seized in accordance with the treaty of May 22, 1924. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

(5) The District Court erred in admitting in evidence testimony regarding the transportation of liquor from the *S. S. Norburn,* which transactions were not shown to have been connected in any way with the conspiracy developed by the Government's proof. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

(6) The District Court erred as to the defendant Quartararo in permitting to go to the jury certain one dollar bills with endorsements thereon alleged to be in the handwriting of said Quar-

tararo, which dollar bills were not shown by any proof whatever to have been connected in any way with the alleged conspiracy. This error was aggravated by the charge of the trial judge relating to these dollar bills. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

(7) The District Court erred as to the defendants Belanger and Quartararo in reopening the case and permitting the introduction into evidence of a telegram alleged to have been sent by said Belanger without any authentication of the said telegram or proof of its connection with the alleged conspiracy. The Circuit Court of Appeals erred in not sustaining the assignments of error on this point.

SUMMARY OF ARGUMENT

PART I

The Lower Court had no jurisdiction over the persons of the defendants, Ford, Harris and Evelyn, to try them for the conspiracy charged against them. These men were not unqualifiedly subject to the jurisdiction of the United States and their courts. They are British subjects and had been brought forcibly, and over their protests, by government agents, into the United States incident to the seizure on the high seas of the British vessel of which they were the officers. The seizure of their vessel was made under claim of authority conferred upon the United States by the treaty with Great Britain of May 22, 1924, 43 Stat. 1761. That treaty was made to set at rest a controversy which had arisen between the two nations regarding the rights of British subjects on the high seas beyond the territorial waters of the United States.

It was intended to deal with the subject in a complete way and to set the extreme limit of the authority of the United States, both as to what the United States might physically seize beyond its territorial waters and as to the sole purpose for which the seizure might be made—in other words, the extent of the legal jurisdiction obtained by the seizure. The treaty provided for the seizure of vessels only and then only for the purpose of adjudicating them in accordance with the laws prohibiting the importation of alcoholic beverages. Both the plain language of the treaty and every consideration affecting its construction including the precedents of international law show that by the treaty Great Britain granted no right to exercise criminal jurisdiction over her subjects on the high seas for violation of the Criminal Code of the United States and that the United States gave up any such claim of authority. Therefore, under the doctrine laid down in *United States v. Rauscher*, 119 U. S. 407, the defendants, Ford, Harris and Evelyn, having been brought within the jurisdiction of the United States by virtue of the limited authority conferred by the treaty, must be allowed to depart without interference for any other purpose than that specifically provided in the treaty, the adjudication of the vessel.

PART II

The indictment in the present case in one count charges a conspiracy to do acts alleged to be unlawful —not simply by virtue of the two statutes of the United States, but by virtue of those specified statutes and in each case by the treaty with Great Britain. From the language of the indictment it is clear that the grand jury believed that a conspiracy to import

liquor within one hour's steaming distance of the coast of the United States was a conspiracy to violate the treaty with Great Britain, and strictly construed in favor of the defendants the indictment does not charge more than that. Such a charge does not state a crime since the treaty does not create any offense against the United States nor extend the scope of any laws of the United States. The indictment is, therefore, demurrable. The action of the Circuit Court of Appeals in sustaining the indictment by disregarding the allegations regarding the treaty was error within the principle of *Ex parte Bain*, 121 U. S. 1, and amounted to an amendment of the indictment.

PART III

The defendants, Ford, Harris and Evelyn, were not shown to have been, at any time prior to being brought into the United States, within the scope of Section 37 of the Criminal Code. Under recognized principles of construction laid down by this Court in *American Banana Company v. United Fruit Company*, 213 U. S. 347, the universal language of Section 37 will not be construed as applying to anyone beyond the jurisdiction of the United States. The defendants, Ford, Harris and Evelyn, being British subjects on a British vessel on the high seas, were never within the jurisdiction of the United States. They were not tried or convicted for any act which took effect in the United States but merely because of a relationship with persons in the United States who there committed alleged criminal acts. There is no rule of law which makes this relationship, not criminal where they were, a violation of any law of the United States.

PART IV

The action of the trial court in overruling defendants' motion to suppress evidence seized on the *Quadra* was, upon the record made, erroneous and improper. Upon defendants' prima facie showing that the seizure had been made beyond the treaty limits, the motion should have been granted unless the Government showed facts which, if true, would enable the court to determine that the seizure was in accord with the treaty. To overrule the motion upon the Government's allegation of the mere conclusion of law that the seizure was within the prescribed limits was in effect to relieve the United States of their treaty obligations. Subsequently when it was developed from the Government's testimony that there was no evidence that the motor boat attendant on the *Quadra* could have under the conditions prevailing at the time of the seizure traversed the distance from the *Quadra* to territory of the United States in one hour, the evidence should have been excluded as not having come rightfully into the possession of the United States but being the property of the British owners in the custody of the Captain and officers of the *Quadra*.

PART V

The trial court erred in permitting evidence to be introduced and to go to the jury relating to the importation of liquor from the vessel *Norburn*. The alleged importation of liquor from this vessel was not shown by proof, direct or circumstantial, to be connected in any way with the alleged conspiracy, and the importation which the evidence referred to was at a time considerably prior to the alleged conspiracy. This evi-

dence was prejudicial to all the defendants. The Circuit Court of Appeals sustained the lower court in the admission of this evidence under a clear misapprehension of fact as shown by its opinion.

PART VI

The trial court erred in permitting evidence to be introduced and to go to the jury concerning one dollar bills with endorsements thereon alleged to have been in the handwriting of the defendant Quartararo and to have been used as a means of ordering liquor. There was an entire failure of any evidence to show the use of these dollar bills in connection with the alleged conspiracy. This evidence was prejudicial to the defendant Quartararo. The charge of the trial judge greatly aggravated the prejudicial effect of this evidence.

PART VII

The trial court erred in permitting evidence to be introduced and to go to the jury as to a wholly ambiguous telegram supposed to have been sent by the defendant Belanger to one Norgan. The importance of this evidence was magnified in that the trial court reopened the case to receive it in evidence after both sides had rested. The sender of this telegram was not properly identified; it was not shown to have been connected with the alleged conspiracy in any way, and its prejudical effect as to the defendants Belanger and Quartararo under the circumstances of its introduction in evidence was incalculable.

ARGUMENT

PART I

THE DISTRICT COURT HAD NO JURISDICTION TO TRY DEFENDANTS FORD, HARRIS AND EVELYN FOR THE CRIME OF CONSPIRACY.

THE FACTS

Ford, Harris and Evelyn were the master and first and second officers, respectively, of the steamship *Quadra*. (R. 89, 330, 401-403, 602-604.) They were in 1924 and are now British subjects. (Rec. 330, 401-403, 603.) The *Quadra* was of British registry. (Rec. 179.) On October 12, 1924, the *Quadra* was seized at a point alleged by the United States to have been 5.7 miles from the North Farallone Islands by the Revenue Cutter *Shawnee* under suspicion of attempting to violate or having violated the laws prohibiting the importation of alcoholic beverages. (Rec. 106, 93, 144.) The *Quadra* and those on board, including, Ford, Harris and Evelyn, were towed against their protests and under threat of force if they should resist, into the port of San Francisco. (Rec. 99, 100, 101, 104-105.) There was no contention by the Government, and there is no evidence, that the *Quadra* or her own boats, or Ford, Harris or Evelyn ever came within three miles of the coast of the United States at any time before the seizure by the United States Revenue Cutter *Shawnee*.

The *Quadra* and the defendants being brought to San Francisco, no proceedings were brought to adjudicate the vessel. But in November, 1924, the defendants, Ford, Harris and Evelyn, were indicted in the United States District Court for the Northern

District of California for the crime of conspiracy to violate the treaty with Great Britain of May 22, 1924, and certain laws of the United States. (Rec. p. 5 et seq.) The indictment set out in full Article II of the treaty with Great Britain of May 22, 1924, (Rec. 7-8.) The defendants, Ford, Harris and Evelyn, were convicted (Rec. 59) and sentenced (Rec. 73-81 et seq.). The sentences were affirmed by the Circuit Court of Appeals. (Rec. 868.)

The defendants Ford, Harris and Evelyn seasonably and vigorously objected that the District Court had no jurisdiction over their persons by virtue of the treaty of May 22, 1924. (Rec. 319, 320-322.) The refusal of the District Court to sustain this objection was reserved and assigned as error. (Assignment of Error, No. 95, Rec. 741-742.) The Circuit Court of Appeals ruled adversely to the defendants upon this assignment of error. (Rec. 846.)

ARGUMENT

It is respectfully submitted that by virtue of the treaty of May 22, 1924, the District Court was without jurisdiction over the persons of the defendants, Ford, Harris and Evelyn, British subjects, who had been brought within the territorial limits of the United States by reason of a seizure on the high seas of their vessel, registered under the British flag, by officers of the United States acting under color of authority conferred by the treaty with Great Britain.

1. The History of the Legal and Diplomatic Situation Which Led to the Treaty of May 22, 1924, Shows That Friction Had Developed Between the United States and Great Britain Because of the Seizure of British Vessels by the United States Beyond the Territorial Waters of This Country, a Practice Never Before Attempted by this Country in Time of Peace.

(a) The Seizure of Hovering Vessels Beyond Territorial Waters Rests Upon the Acquiescence of the Soverign Whose Flag Is Thus Violated, and Is Not a Matter of Right.

Both Great Britain and the United States have strictly maintained that three miles from the coast marks the limit of territorial waters.

> "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast." Mr. Fish, Secretary of State to Sir Edward Thornton, British Minister, January 22, 1875, Foreign Relations 1875, 1, 649-650; 1 Moore's Digest of International Law, 731.
>
> See also Mr. Buchanan, Secretary of State, to Mr. Crampton, British Minister, August 19, 1848, M. S. Notes to Great Britain, VII, 185, 1 Moore 730. Mr. Evarts, Secretary of State, to Mr. Fairchild, Minister to Spain, No. III, March 3, 1881, Foreign Relations 1881, 1051; 1 Moore 732. See also *Cunard S. S. Co. v. Mellon,* 262 U. S. 100, 122.

Beyond that limit lie the high seas over which no nation can exercise jurisdiction. A ship upon the high

seas is, within contemplation of the law, subject solely to the jurisdiction of the nation whose flag she flies. No other nation, apart from treaty, may lawfully interfere with her.

> "Merchant vessels on the high seas being constructively considered for most purposes a part of the territory of the nation to which they belong, they are not subject to the criminal laws and processes of another nation; and any attempt of the officers or citizens of the latter to execute and serve such laws and processes on board of them can only be regarded as an illegal proceeding which their masters and crews are justified not only in disregarding but also in resisting." Mr. Blaine, Secretary of State, to Mr. Ryan, Minister to Mexico, November 27, 1889, relating to an alleged attempt made by Mexican officials to serve process on the master of an American vessel when 9 miles from land for an offense alleged to have been committed on a previous voyage. Foreign Relations, 1889, 614, 1 Moore, 931.

All nations have made sorties beyond the three-mile limit to repress vessels hovering along their coasts in the attempt to violate the territorial law. These extraterritorial acts are, however, founded upon acquiescence rather than upon any right to exercise jurisdiction beyond the three-mile limit.

> "It is questionable whether seizures of hovering vessels have graduated from the class of tolerated actions in excess of international rights to that of proceedings sanctioned by international law. It seems that the acquiescence has not been so general as to support the latter view." 36 Harvard Law Review, 609, 614.

In the case of *The Cagliari,* Dr. Twiss stated the situation clearly in an opinion given to the Sardinian Government. He said:

> "In ordinary cases, indeed, where a merchant ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* toward the other state with which he is in amity, and to have consequently forfeited any just claim to his protection." 1 Moore's Digest of International Law 729-730.

Our own State Department has clearly stated that in exercising the authority to board vessels within four leagues of our coast conferred by the Act of March 2, 1799, Ch. 22, 1 Stat. 627, this Government claimed no jurisdiction beyond the three-mile limit *in invitum* but by the implied consent of vessels voluntarily coming to an American port since "no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States." Mr. Fish, Secretary of State, to Sir Edward Thornton, British Minister, January 22, 1875, Foreign Relations, 1875, I, 649-650, 1 Moore, 731; Mr. Evarts, Secretary of State, to Mr. Foster, April 19, 1879, MS. Inst. Mex. XIX 579, 1 Moore, 731.

And Sir Charles Russell in the Fur Seal Arbitration proceedings (1893) stated that:

> "In no such case by international law could it (a 'hovering act') be maintained as of right against an objecting nation." 13 Fur Seal Arbitration, 1076.

In a group of early cases in this court the subject of seizure beyond the three-mile limit was discussed. *Church v. Hubbart,* 2 Cranch 187; *Rose v. Himely,* 4 Cranch, 241; *Hudson v. Guestier,* 6 Cranch 281. These cases are most obscure—See Marshall, C. J., in *Hudson v. Guestier,* supra, at 285—and it is probable that the court did not pass upon the validity of the seizures under international law. See Wheaton, International Law, 8 Ed., Sec. 179, Note 108; 1 Moore 727-730. One thing alone appears clearly,—the exercise of authority beyond the three-mile limit depends upon its acceptance by other nations, in each instance, as reasonable under the conditions. In *Church v. Hubbart,* supra, at page 235, Marshall, C. J., said:

> "In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus, in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels, but for the purpose of illicit trade, the vigilance of the government may be extended somewhat farther; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.
>
> "If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was

carried so far, that the *guarda costa* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length, of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended, that it could only be exercised within the range of the cannon from their batteries."

There has been nothing more provocative of international friction than searches and seizures by one nation of the vessels of another nation on the high seas. It is only necessary to recall the difficulties which arose during the Napoleonic wars, the *Trent* affair, and the problems of 1914 to 1917 to understand the suspicion with which the exercise of such authority has been and is regarded.

(b) The Cases from 1799 to 1922 Show No Instance of a Seizure of a Foreign Vessel, Hovering Along Our Coast Which Had Never Come Directly or by Means of Its Own Boats Within the Three Mile Limit.

The American "Hovering Act" was contained in the Act of March 2, 1799, Ch. 22, 1 Stat. 627. Section 27 of that act, 1 Stat. 646, provided that if after the arrival of any vessel, laden with goods and bound to the United States from a foreign port, within four leagues of the coast any part of the cargo should be unladen before the ship came to the proper place for discharge the master was liable to a penalty *and the goods so unladen should be forfeited.*

Section 28 provided that any vessel into which goods

might be unladen in violation of Section 27 should be forfeited.

Section 50 of the same Act provided for the forfeiture of a vessel unloading at night goods exceeding $400 in value without a permit from the customs authorities.

Sections 27 and 28 of the Act of March 2, 1799, became Sections 2867 and 2868, respectively, of the Revised Statutes. Section 50 of the said Act became Sections 2872, 2873, 2874 of the Revised Statutes. All these sections remained in force until repealed by Sections 642 and 643 of the Tariff Act of 1922, 42 Stat. 858, 989.

The reported cases arising under Sections 27 and 28, supra, (Rev. Stat. Sec. 2867 and 2868) are very few. In *The Betsey,* (1818) Fed. Case 1365, a Spanish vessel unloaded cargo into *The Betsey* within four leagues of the coast of the United States. *The Betsey* was forfeited. It does not appear whether the unlading was within or without the three mile limit. It also does not appear that *The Betsey* was a foreign vessel. From the facts of the case,—and of *The Abby,* Fed. Case 14, arising out of the same transaction—it would seem that *The Betsey* and *The Abby* were small coasting vessels, probably American.

In *The Coquitlam,* (1893), 57 Fed. 706, certain sealing vessels unloaded cargo into the British vessel *Coquitlam* within four leagues of the coast of the United States and beyond the three mile limit. The District Court forfeited the vessel under Rev. Stat. 2868. The Circuit Court of Appeals, (77 Fed. 744) reversed the decree on the ground that the sealing vessels were not bound for the United States and that the unlading was not unlawful under Section 2867 of the

Revised Statutes. The American and British Claims Arbitration Tribunal awarded damages against the United States for the seizure of *The Coquitlam* in the amount of $48,000. See Report of Fred K. Neilson, Agent, June 25, 1926, pp. 444-451. See also *The Javirena*, 67 Fed. 152 (1895).

In *The Virgin*, Fed. Case 16,625 (1806), and *Cargo Ex Lady Essex*, 39 Fed. 765 (1889) the libels were dismissed. See also *U. S. v. Curtis*, 16 Fed. 184 (1883).

Sections 2872, 2873, 2874 of the Revised Statutes, (Section 50 of the Act of March 2, 1799), have been before the courts more often. An early line of cases held that this section was not applicable unless the unlading occurred in a port of the United States.

The Hunter, Fed. Cas. 15,428 (1806)
U. S. v. Brant, Fed. Cas. 14,637 (1806)
The Active, Fed. Cas. 33 (1866)

In the remaining cases the unlading was in a port of the United States and therefore within the three mile limit. In certain of the cases there are *dicta* to the effect that Section 50 of the Act of March 2, 1799, *supra*, is applicable within four leagues of the coast. In no case, however, is such a situation involved.

The Industry, Fed. Cas. 7,028 (1812)
The Harmony, Fed. Cas. 6,081 (1812)
The Sarah Berenice, Fed. Case. 12,343 (1867)
Clark v. Insurance Co., Fed. Cas. 2832 (1840)
Jackson v. United States, Fed. Cas. 7149 (1826)
The Gertrude, Fed. Cas. 5370 (1841)
Peisch v. Ware, 4 Cranch. 347 (1808)
United States v. Twenty Cases of Matches, Fed. Cas. 16559 (1868)
Locke v. U. S., 7 Cranch. 339 (1813)

United States v. 218½ Carats Loose Emeralds, 153 Fed. 643 (1907)

In *The Abby*, Fed. Cas. 14, (1818) the libel was brought under Section 50, *supra*, and also for violation of the law prohibiting an American vessel from engaging in a trade other than that for which it was licensed. The Court rested its decision wholly upon the second point.

Another series of cases involving the right of seizure beyond the three mile limit grew out of the seizures in Bering Sea in the years 1886, 1887, and 1889 of British vessels engaged in seal hunting in alleged violation of Sec. 1956 of the Revised Statutes. These seizures were made between fifteen and one hundred and fifteen miles off the coast of Alaska. See 1 Moore, 919. In *In Re Cooper*, 143 U. S. 472, a petition for a writ of prohibition to prevent the forfeiture of the British ship *W. P. Sayward* alleged to have been seized fifty-nine miles from shore of Alaska came before this court. This court refused to pass upon the legality of the seizure and denied the writ upon the ground that even if the territorial waters only extended three miles from the coast, the seizure might have been within such limits so far as the record showed since it was merely stated to have been "within the limits of Alaska Territory, and in the said waters thereof." This finding of fact was thought to be binding on the Court. See also *The Kodiak*, 53 Fed. 126.

Subsequently the controversy between the United States and Great Britain arising out of these seizures was referred to an Arbitral Tribunal on which sat Mr. Justice Harlan. The Tribunal decided that the

United States did not have the right to make seizures beyond the three mile limit. See 1 Moore, 910, 913. Damages were awarded against the United States on account of these seizures including the seizure of the schooner *W. P. Sayward.* 1 Moore, 922; 2 Moore, International Arbitrations, 2123.

It seems to have been generally conceded in the controversies over the fur seal seizures that if a vessel sent its own boats within the three mile limit even though the vessel itself remained outside, the vessel nevertheless might be, in contemplation of law, regarded as within the territorial waters and violating the territorial law.

> *The Case of the Araunah* (1892), 1 Moore, 908.
> *United States v. Jane Gray* (1896), 77 Fed. 908.
> *The Tenyu Maru* (1910), 4 Alaska 129.

Thus up to the time of the decision of the cases next to be considered, arising in connection with the enforcement of the national prohibition of intoxicating liquors, there is no case of the seizure and forfeiture of a foreign vessel in time of peace which had never itself or through its boats come within the territorial waters of the United States, except in the fur seal controversy and for these seizures the United States paid compensation.

c. In 1922 the United States Began to Make Seizures Beyond the Three Mile Limit Which Action Evoked Protests From Great Britain.

In 1919 the National Prohibition Act, 41 Stat. 305, was passed. This Act is effective only three miles from the coast of the United States. *Cunard Steamship Company v. Mellon,* 262 U. S. 100, 122.

On September 21, 1922, the "Tariff Act of 1922" was passed, 42 Stat. 858. This Act, in Section 586, specifically imposed the penalty of forfeiture upon any vessel, unlading without permission from the customs authorities, within four leagues, or twelve miles of the coast of the United States.

Meanwhile the U. S. District Court in Massachusetts decided *The Grace and Ruby,* 283 Fed. 475. (September, 1922.) This case applied the reasoning of the *Tenyu Maru, supra,* and the sealing cases. It held that *The Grace and Ruby,* a British ship, by unlading its cargo beyond the three mile limit into a motor boat which went to shore accompanied by the *Grace and Ruby's* boats and crew, was guilty of an unlawful unlading at night within the territorial limits of the United States which warranted the forfeiture of the vessel under Rev. Stat. Sec. 2872, 2874. This principle was not new.

The Henry L. Marshall, 286 Fed. 260 (Oct., 1922), affirmed 292 Fed. 486, marked an extension of the principle of *The Grace and Ruby, supra.* The *Henry L. Marshall,* an alleged British vessel, was seized in the summer of 1921 nine or ten miles from the coast of the United States. She had unloaded liquor into motor boats, *not her own,* which had taken it within the three mile limit. *No boat belonging to the Marshall and no member of her crew came within the three mile limit.* The vessel was forfeited.

The British government protested against this seizure. The protest was finally withdrawn upon the ground that the vessel was not of *bona fide* British registry; but in withdrawing the protest the British government did not acquiesce in the principle of the ruling. See Statement of Hon. Charles E. Hughes, Jan. 23, 1924, *infra.*

After the seizure of the *Marshall*, the government seized a considerable number of British vessels under the same circumstances; that is, vessels which had never directly or by their small boats or crew come within the three mile limit. See *infra*, page 24. The British government vigorously protested these seizures. On June 26, 1922, Mr. Hughes, Secretary of State, proposed to Great Britain that a treaty be entered into giving to the authorities of each nation the right to search vessels of the other within twelve miles from shore. This offer was declined by Great Britain on Oct. 13, 1922. See *New York Times*, Oct. 17, 1922. The *London Times*, July 30, 1922, characterized Mr. Hughes' proposal as a "tall order" calling for "fussy interference." See *London Times*, July 30, 1922.

On October 28, 1922, the Treasury Department ordered the release of the British vessel *Emerald* seized more than three miles from shore. On November 10, 1922, the Treasury Department upon request of the Department of State and the Department of Justice published an order directing the release of all foreign vessels seized outside the three mile limit where there was no evidence of communication with the shore by means of the vessel's own boats. The text of the order is as follows:

"November 9, 1922.

The Collector of Customs,
New York, N. Y.
Sir:

The Department is in receipt of your telegram of the 8th instant, relative to the seizure of the British auxiliary Schooner M. M. GARDNER, on September 13, 1922.

It appears from your report that the seizure was made outside the three-mile limit, and that while the master admitted unlading part of the cargo beyond the three-mile limit there is no evidence that the vessel was communicating with the shore by means of her own boats or equipment.

Under these circumstances it is the desire of the Department of State and the Department of Justice that all foreign vessels so seized shall be released, and you will be governed accordingly. A report shoud be made to the Department in each instance.

Respectfully,

s/d A. W. MELLON,
Secretary.

No enclosure.

About twenty vessels were released in accordance with this order, reloaded with their cargoes, and conveyed to the point of seizure. See *New York Times*, Nov. 11, 1922.

The practice of the Treasury Department, so far as can be learned, continued in accordance with the above order until the ratification of the Treaty with Great Britain on May 22, 1924.

Thus for more than one hundred years—from 1799 to 1921—the Government in enforcing the revenue acts had not seized foreign vessels beyond the three mile limit when these vessels had not come within the three mile limit directly or through their own boats. In 1921-1922, a new practice was inaugurated as shown in *The Henry L. Marshall, supra*, resulting in the seizure of foreign vessels beyond the three mile limit which had communicated with the shore by means of boats not their own. The British government at once

protested and apparently protested earnestly. At the same time, that government rejected a proposal to allow unlimited search within twelve miles of the coast. As a result of the attitude of foreign governments, the Government of the United States released all vessels seized beyond the three mile limit that had not made contact with the shore with their own boats and abandoned the practice of seizing these vessels.

Such was the situation when the Treaty with Great Britain was made.

2. The Treaty of May 22, 1924, Was Made to Settle in a Complete Way All Questions Involving the Interference With British Vessels Beyond Territorial Waters.

On January 23, 1924, the Hon. Charles E. Hughes, Secretary of State announced a treaty with Great Britain to prevent the smuggling of intoxicating liquors. The announcement was made in an address before the Council on Foreign Relations in New York City. Mr. Hughes reviewed at length the international problems which had arisen out of the seizures of foreign vessels beyond the three mile limit and which it was the purpose of the treaty to set at rest.* (American Journal International Law, Vol. 18, No. 2, Page 229).

*"*Questions arising from the smuggling of intoxicating liquors.*— Foreign nations are naturally tenacious of their rights upon the high seas, and, on the other hand, our Government cannot look with indifference upon the attempts of hovering vessels, claiming the protection of foreign flags, illicitly to introduce their cargoes of liquors into the commerce of the United States. This Government must use every proper means to put a stop to this illegal traffic. It should be remembered, however, that authority with respect to the high seas cannot be effectively conferred by acts of Congress if these are in contravention of international law, even

The treaty which was announced by Mr. Hughes had been signed at Washington on the day on which he spoke, January 23, 1924. Ratifications were exchanged and the treaty proclaimed by the President on May 22, 1924, 43 Stat. 1761.

In the proclamation of the President, the treaty is described as a convention "to aid in the prevention of the smuggling of intoxicating liquors into the United States."

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though such legislative acts as municipal law would govern the decisions of our own courts.

"Where international rights and obligations are involved, controversies not otherwise adjusted would naturally come before an international arbitral tribunal whose decisions would be governed by international law and would not be controlled by municipal law. This principle was explicitly recognized in the recent decision by Chief Justice Taft, as arbitrator in the controversy between Great Britain and Costa Rica, where the Chief Justice illustrated the point that, while in our system an act of Congress might for municipal purposes repeal a treaty, the United States could not thus get rid of an international obligation which would continue and would be enforced by an international arbitral tribunal. The Chief Justice said:

> 'This is not an exceptional instance of an essential difference between the scope and effect of a decision by the highest tribunal of a country and of an international tribunal. The Constitution of the United States makes the Constitution, laws passed in pursuance thereof, and treaties of the United States the supreme law of the land. Under that provision, a treaty may repeal a statute and a statute may repeal a treaty. The Supreme Court can not under the Constitution recognize and enforce rights accruing to aliens under a treaty which Congress has repealed by statute. In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect.'

"The Government of the United States has repeatedly asserted that the limits of territorial waters extend to 3 marine miles outward from the coast line. This has been asserted by our Government in making claims upon other Governments. With respect to Spain's claim of jurisdiction over the waters adjacent to Cuba, Secretary Seward wrote to the Spanish minister as follows:

> 'It cannot be admitted, nor indeed is Mr. Tassara understood to claim, that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. His right

In the preamble of the treaty it is recited that the two nations

> "Being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages:
>
> "Have decided to conclude a Convention for that purpose; * * *"

The Convention follows:

ARTICLE I.

The High Contracting Parties declare that it is their firm intention to uphold the principle that 3

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to a jurisdiction of three miles is derived, not from his own decrees, but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever. He cannot, by a mere decree, extend the limit and fix it at six miles, because if he could, he could in the same manner, and upon motives of interest, ambition, or even upon caprice, fix it at 10 or 20 or 50 miles, without the consent or acquiescence of other powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained. * * *

'In view of the consideration and facts which have been thus presented, the undersigned is obliged to state that the Government of the United States is not prepared to admit that the jurisdiction of Spain in the waters which surround the island of Cuba lawfully and rightfully extends beyond the customary limit of 3 miles.'

"Secretary Fish, writing to the British Minister in 1875, said: 'We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast.' And Secretary Evarts, in a communication to the Minister of Spain, concerning the visitation and firing upon certain American vessels near Cuba in 1880, said: 'The Government must adhere to the 3-mile rule as the jurisdictional limit, and the cases of visitation without that line seem not to be excused or excusable under that rule.' The general principle was thus stated by the Supreme Court of the United States in the recent case of the Cunard Steamship Company v. Mellon (262 U. S. 100, 122): 'It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal

marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters.

ARTICLE II.

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United

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belt of the sea extending from the coast line outward a marine league, or 3 geographic miles.'

"In the Bering Sea arbitration it was held that the United States had no jurisdiction in the Bering Sea fisheries beyond the 3-mile limit and in the case of the British schooner *Sayward* the United States was required to compensate Great Britain for interfering with its sealing operations outside the 3-mile limit. The American-British Claims Arbitration Tribunal in December, 1920, awarded damages against the United States on account of the interference by officers with the British vessel *Coquitlam* because of transfer of cargo off the Pacific coast outside the 3-mile limit.

"It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the 3-mile limit and in order to avoid liability to other Governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized. It does not follow, however, that this Government is entirely without power to protect itself from the abuses committed by hovering vessels. There may be such a direct connection between the operation of the vessel and the violation of the laws prescribed by the territorial sovereign as to justify seizure even outside the 3-mile limit. This may be illustrated by the case of 'hot pursuit' where the vessel has committed an offense against those laws within territorial waters and is caught while trying to escape. The practice which permits the following and seizure of a foreign vessel which puts to sea in order to avoid detention for violation of the laws of the State whose waters it has entered, is based on the principle of necessity for the 'effective administration of justice.' (Westlake, Part I, p. 177.) And this extension of the right of the territorial State was voted unanimously by the Institute of International Law in 1894.

"Another case is one where the hovering vessel, although lying outside the 3-mile limit, communicates with the shore by its own boats in violation of the territorial law. Thus Lord Salisbury said,

States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall

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with respect to the British schooner *Araunah*, that Her Majesty's Government were 'of opinion that, even if the *Araunah* at the time of the seizure were herself outside the 3-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the principles of the municipal law regulating the use of those waters.' A case similar to this was that of the *Grace and Ruby* (283 Fed. 476).

"It will be noted that in the case of the *Araunah* it was the vessel herself that was deemed subject to seizure outside the 3-mile limit, and not simply her small boats, and this was manifestly because of the direct connection between the conduct of the vessel and the violation of the law of the territory. It may be urged with force that this principle should not be limited to the case of the use by the vessel of her own boats, where she is none the less effectively engaged, although using other boats, in the illegal introduction of her cargo into the commerce of the territory. Such a case was that of the *Henry L. Marshall*, recently decided by the Circuit Court of Appeals of the Second Circuit (292 Fed. 487-488). The *Marshall*, a vessel sailing under British registry, in 1921 obtained clearance from the Bahama Islands laden with a cargo of intoxicating liquors. She had two clearances, both dated the same date, signed by the same collector of revenue, one of which stated that she had cleared for Halifax with the cargo in question and the other that she had cleared for Gloucester, Mass., in ballast.

"The same collector furnished two bills of health, simply differing as to destination. It was abundantly proved that the real object and only business of the *Marshall* was to peddle liquor along the coast of the United States and particularly did she pursue her vocation while lying from 9 to 10 miles off Atlantic City and sent liquor on shore pursuant to previous arrangements made in the United States by motor boats. She was seized outside the 3-mile limit and condemned. Circuit Judge Hough, speaking for a unanimous court, after referring to the case of the *Grace and Ruby*, said: 'The difference between the facts there presented and those at bar is that, instead of arranging to unload and deliver the cargo

not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

ARTICLE III.

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason

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of the schooner by, through, or with some assistance from the schooner's crew or equipment (as in the case cited), the whole matter was performed by a previous arrangement with those controlling the *Marshall* but with small boats that did not belong to the schooner and were not even partially manned by men from her crew. But it is just as true in this case as it was in the case of the *Grace and Ruby*, that 'the act of unlading, although beginning beyond the 3-mile limit, continued until the liquor was landed.'

"The vessel was thus found to be engaged, not in the exercise of her admitted rights upon the high seas, but in unlawfully unloading her cargo into the territory of the United States, in 'an actual introduction of a part thereof into the commerce of the United States' contrary to its laws. It should be added that while the British Government originally made a protest in this case, it was finally withdrawn upon the ground that the vessel was not of *bona fide* British registry, and it should be said that in this withdrawal the British Government did not acquiesce in the principle of the ruling. In view, however, of the historic practice of nations in the protection of their territory from the violation of their laws by hovering vessels, the United States Government cannot admit that the accepted rules of international law preclude such action as that taken in the circumstances of the *Marshall* case.

"But it is apparent that, whatever measures this Government may believe that it is free to adopt in accordance with the principles of international law, these, so far as they are practicable, are far from adequate to meet the exigency; and, further, the diplomatic history of the United States reveals the fact that maritime powers, including the United States itself, are highly sensitive to attempts by foreign authorities to seize their vessels on the high seas in time of peace. In each case of seizure there are likely to be serious questions of fact and law, and at any time there may be

of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

ARTICLE IV.

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations

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collisions of authority which would be embarrassing to friendly relations. It is precisely in matters of this description, where the sense of grievance and resentment are so easily aroused, that the effort should be made to reach an international agreement suited to the case. We need to put the measures that are required for the adequate enforcement of our laws on an impregnable basis and to invite and secure the friendly cooperation of the maritime powers.

"Again, foreign powers have complained of what they regard as a departure from international comity through the maintenance of the present restrictions of law under which their vessels are not permitted to enter our waters or call at our ports if they have cargoes of liquors on board, although these may be kept under seal and are not to be delivered within the territory of the United States. Nations who fully appreciate our authority, and our right to enforce our own policy, cannot understand such a restriction which interferes with their trade with countries other than our own. They can not understand why a ship from a foreign port with a cargo consigned to another foreign port is unable even to traverse our waters, or to visit our ports, because the cargo on

contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claims shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

ARTICLE V.

This Treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the Treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the Treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the Treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the Treaty, and to the provision that if such modifications are not

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board, which is destined for other countries, is of the sort we do not wish for our own. In this situation there is the plainest opportunity for a fair agreement not in derogation of our principles but to aid in their proper enforcement—not only without the slightest departure from, but with a manifest increase in, the safeguards required for our protection against the introduction of intoxicating liquors.

"Accordingly, negotiations have been undertaken to reach an appropriate international agreement upon this subject and I am happy to say that such an agreement has been concluded with Great Britain today. There are other Powers which I believe are quite ready to act in a similar way. This will be a long step toward removing causes of irritation and it is precisely as we remove such causes that we shall really make progress in furthering the interest of peace."

agreed upon before the close of the period of one year, the Treaty shall lapse.

ARTICLE VI.

In the event that either of the High Contracting Parties shall be prevented either by judicial decisions or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded.

The present Convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged at Washington as soon as possible.

The treaty of May 22, 1924, was expressly stated therein to have been for the purpose of "avoiding *any* difficulties which might arise" between the United States and Great Britain "in connection with the laws in force in the United States on the subject of alcoholic beverages." There already had been difficulties. The United States had seized vessels beyond the three mile limit which had neither themselves nor by their own boats come within territorial waters. Great Britain had resisted the exercise of any such jurisdiction over such vessels. Such vessels in the past had been regarded by both nations, and by international law as being upon the high seas, and immune—if the sovereign chose to insist upon it—from any exercise of authority by another nation.

The treaty in order to avoid *any* difficulty was con-

cluded to define the jurisdiction which the United States might exercise beyond the three mile limit. That the rights conferred were exclusive and strictly limited is shown not only by the language conferring them but by Article I of the treaty. In that article the two nations agree that it it their firm intention to uphold the principle that *three marine miles from low water mark constitute the proper limits of territorial waters.* In other words, the preexisting rules of international law as maintained by the two nations are to remain unchanged except as specifically provided in the treaty.

Furthermore, the rights conferred upon the United States for dealing with vessels carrying or suspected of carrying alcoholic liquors were exclusive. Only the specific jurisdiction mentioned in the treaty was conferred and all other was prohibited. As stated by District Judge Morton in *The Frances Louise*, 1 Fed. (2nd) 1004, 1005-6:

> "The circumstances surrounding the execution of the treaty (of May 22, 1924) are matters of general knowledge. Vessels of British registry were laying off our coasts, delivering liquor to small boats, which smuggled it ashore. Seizures of such vessels were made by our officials, which were regarded by the British Government as unjustified by international law, and led to representations by the British Government to this country * * *. Under these circumstances the treaty was negotiated * * *. *I think both nations intended the treaty to deal with the matter in a complete way.*" (Italics ours).

In the above case the contention was made that even though the vessel had been seized beyond the limits

permitted by the treaty, its seizure was justified under international law, and that the treaty did not cut down that alleged general right of seizure. The court refused to consider the alleged general right under international law saying that the treaty dealt with the entire matter of seizures in a complete way.

In *The Sagatind,* 11 Fed. (2nd) 673, the Circuit Court of Appeals (Second Circuit) said:

> "We agree with *The Frances Louise,* 1 Fed. (2nd) 1004, that these treaties (with Great Britain and Norway) *exclusively* determine the status of vessels of appropriate nationality lying off the shore of the United States; * * *" (Italics ours).

and in the same case (4 Fed. (2nd) 928, 930), District Judge A. N. Hand, said:

> "The foregoing treaty extends any limitation which might exist upon the jurisdiction of the court to proceed against offending vessels which may be subject to forfeiture for violations of our laws 'prohibiting the importation of alcoholic beverages' to such cases as may come within the terms of the treaty, and, I think, also implies as an alternative rule of treaty-made law that vessels shall not be proceeded against for violation of such laws when seizure was made beyond the distance from our coast prescribed in the treaty. In other words, the treaty completely deals with the extreme right of seizure upon which initial jurisdiction of the cause of forfeiture must depend."

In *The Marjorie E. Bachman,* 4 Fed. (2nd) 405, 408, the court said:

"Moreover, as to British vessels, this country has expressly agreed not to seize them, except within the provisions of the treaty. As to them, if there is no case under the treaty, there is no case at all when they are on the high seas."

3. By the Treaty of May 22, 1924, Great Britain Granted the Right to Seize British Vessels in Certain Areas Beyond Territorial Waters for the Sole and Limited Purpose of Adjudicating the Vessel Only in Accordance with the Laws of the United States Prohibiting the Importation of Alcoholic Beverages.

As incident to the consideration of the provisions of the treaty, it is appropriate to bring to the attention of the Court the well established rules of interpretation and construction of treaties as announced by the late Mr. Justice Day in his monograph on treaties (38 Cyc., 961-982). The text was supplied by numerous decisions of this Court.*

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* At page 964 thereof, it is stated:

"In the United States, however, it [a treaty] is more than a contract between nations, being, as declared by the constitution, the supreme law of the land, and binding upon all the courts, both state and federal, and therefore obligatory upon all the people of the nation so that every citizen is under a duty to observe and respect the law of the treaty. A treaty, therefore, in the United States, provided it is self-executing, and its terms do not import a contract to be performed, but prescribe a rule by which private rights may be determined, is in the nature of a legislative act, and is placed by the constitution upon the same footing as an act of congress, * * *."

At page 975 thereof, it is further stated:

"The federal constitution provides that that instrument and the laws and treaties of the United States shall be the supreme law of the land, and binding upon the judges in every state, anything in the constitution or laws of any state to the contrary notwithstanding. By this provision treaties are expressly made superior to both the constitution and laws of the several states, and while there is no express provision in the constitution as to the effect of conflicts between treaties and acts of congress, they are placed by that instrument upon the same footing, each being declared to be the supreme law of the land, so that neither having any inherent

In the present treaty we find a complete code of what is agreed by both parties to the convention and exactly what may be done by each. No legislation whatever is called for or necessary to put the treaty into effect. The rights of both Nations, contracting parties, and all citizens or subjects of both are therein defined. The treaty, therefore, is a municipal law of the United States cognizable and enforcible by its courts.

The rules of construction of treaties are the same as those relating to simple contracts.

The case of *The Amiable Isabella*, 6 Wheaton 1, involved an interpretation of the Spanish Treaty of 1795 as it affected a prize vessel. The opinion was rendered by Justice Story, who, at pages 71 and 72, used the following language:

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superiority over the other, either may supersede the other, *and in case of conflict the one which is later in date will control.*" (Italics ours.)

At page 972 thereof, it is further stated:

"When a treaty does not require subsequent legislation to render it effective, after ratification it is the law of the land and will be enforced by the courts the same as a federal legislative act; but where a treaty is incomplete within itself and requires subsequent legislation to render it effective, manifestly it cannot be enforced by the courts until such necessary legislation is had; such as, for instance, where an appropriation of money is necessary to carry the treaty into effect, and until congress makes such an appropriation the treaty is incomplete, for under the constitution money cannot be appropriated by the treaty making power. A treaty is to be regarded in courts of justice as equivalent to an act of congress whenever it operates of itself without the aid of any legislative provision; * * *."

This Court has tersely remarked the distinction between treaties which are municipal laws of the land and enforcible by the courts and those not such in these words:

"A treaty, then, is the law of the land as an act of Congress is, whenever its provisions *prescribe a rule* by which the rights of the private citizen or subject *may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would a statute." (Italics ours)

(Head Money Cases, 112 U. S. 580, 598, 599.)

"In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

"In the next place, this court is bound to give effect to the stipulations of the treaty, in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms, as with substance."

The language quoted above was afterwards quoted with approval by Justice Harlan in the case of the *United States v. Choctaw and Chickasaw Nations*, 179 U. S. 494, 533, and has been followed in numerous decisions of this court.*

* In the case of the *United States v. Arredondo*, 6 Peters 689, the Court, speaking through Justice Baldwin, at page 710, used the following language:

"The laws under which we now adjudicate on the rights embraced in the treaty, and its instructions, authorize and direct us to do it judicially, and give its judicial meaning and interpretation *as a contract*, on the principles of justice and the rules of equity." (Italics ours)

The case of the *United States v. Reynes*, 9 Howard 127, involved the construction of the Treaty of St. Ildefonso between Spain and France in connection with the Treaty of Paris between France and the United States. At page 148, the Supreme Court, speaking through Mr. Justice Daniel, said:

"In the construction of treaties, the same rules which govern other compacts properly apply."

In the case of the *United States v. D'Auterive et al*, 10 Howard 609, involving the construction of the Treaties of St. Ildefonso and of Paris, mentioned in the preceding case, the Court used language at page 623, as follows:

"The compacts between governments or nations, *like those between individuals*, should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed." (Italics ours)

The case of *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733, involved the disposition of lands which had been granted to an Indian tribe under a treaty dated June 2, 1825. At page 751 the Court used the following language:

"* * * but treaties, like statutes, must rest on the words used, —'*nothing adding thereto, nothing diminishing.*' In Rex v. Barrell, 12 Ad. & Ell. 468, Patteson, J., said, 'I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty.' Courts have always treated the subject in the same way, when asked to supply words in order to give a statute a particular meaning which it would not bear without them." (Italics ours)

The case of *Tucker v. Alexandroff*, 183 U. S. 424, involved a construction of a treaty with Russia as it affected deserting seamen. The opinion was rendered by Mr. Justice Brown, who, at pages 436 and 437 used language as follows:

"Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. *Ex parte McCardle*, 7 Wall.

Let us now look to the terms of the treaty itself for the definition of rights here controlling.

When only does this treaty authorize seizure and for what purpose *only?*

The treaty in all its parts expressly confines its application to our Prohibition Laws and *their* enforcement.

The prelude is:

> The High Contracting Parties, "being desirous of avoiding any difficulties which might arise be-

506; Endlich on Stats. secs. 397, 400. As observed by Lord Denham in *Aspdin v. Austin*, 5 Ad. & El. (N. S.) 671, 684, 'where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.' The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius.*"

* * * * *

"As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (vol. 1, p. 174): 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. *Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.*" (Italics ours)

Among the rules for the construction of treaties found in 38 Cyc. at pages 969 and 970, by Mr. Justice Day, will be found the following:

"If the terms of the treaty are clear and unambiguous the courts must recognize and enforce it as written, notwithstanding the language of the treaty is inconsistent with the correspondence which preceded it; but if the treaty is open to construction they should endeavor to ascertain and give effect to the intention of the parties, and in so doing will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally, and *particularly those applicable in the construction of contracts between individuals.*" (Italics ours)

tween them in connection with the laws in force in the United States *on the subject of alcoholic beverages;* have decided to conclude a convention *for that purpose;*" (Italics ours)

Then follows Article I of the treaty, preserving intact the three-mile limit of our territorial waters for the purpose of criminal and of judicial jurisdiction, as follows:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that *3 marine miles* extending from the coastline outwards and measured from low-water mark *constitute the proper limits of territorial waters.*" (Italics ours.)

Article II, following, concedes the right of search "*outside of the territorial waters,*" for the purpose of ascertaining whether the vessel or those on board are endeavoring to *import or have imported alcoholic beverages* into the United States, its territories or possessions in violation of the laws there in force." Section 3 merely fixes the limits of the treaty concessions "outside of the territorial waters."

The treaty provisions as to what may be seized, and the limits of the use to which the fruits of seizure and the incident search may be put, are then expressly defined by section (2) of this article, as follows:

> "(2) If there is reasonable cause for belief that the *vessel* has committed or is committing or attempting to commit an offense against *the laws of the United States,* its territories or possessions *prohibiting the importation of alcoholic beverages,* the *vessel* may be seized and taken into a port of

> the United States, its territories or possessions for *adjudication* in accordance with such laws." (Italics ours.)

The only laws *prohibiting* the importation of liquors into the United States are the Prohibition Laws. By that provision of the treaty it is stipulated:

(a) There must be a reasonable cause to believe "that *the vessel* has committed or is committing or is about to commit an offense against our laws prohibiting the importation of alcoholic beverages." This does not include the right to seize for suspected violation of our tariff laws, nor does it include the right to search for suspected violation of our Criminal Code, including Section 37, thereof. The treaty expressly confines the right to seize for suspected violations of our Prohibition Laws to do which, at present, the suspected purpose must be to bring liquor within 3 marine miles of our coast. See *Cunard S. S. Co. v. Mellon, supra,* 122.

After searching the vessel and questioning those on board if there is reasonable ground to believe the particular *vessel* itself has committed or is about to commit an offense against our laws prohibiting the importation of liquors, the *vessel* only may be seized and *adjudicated* under our prohibition laws. It is significant that while *those on board* were mentioned and the questioning thereof permitted in sec. (1) of Article II of the treaty, neither seizure nor adjudication as to *them* is permitted by sec. (2) thereof.

(c) Furthermore, when the vessel is seized it is for adjudication only under our laws prohibiting the importation of alcoholic beverages and not our tariff laws or Criminal Code. The treaty express-

ly so confines the conceded right. It limits what may be seized and the purpose of such seizure in express words to "the *vessel* may be seized and taken into a port of the United States for *adjudication* in accordance with *such* laws. *Such* laws is referable back to the phrase "prohibiting the importation of alcoholic beverages." There is, therefore, no right accorded by the treaty to seize a British ship for any other purpose than for adjudication, or to adjudicate it under any other than the prohibition laws of the United States. That conceded treaty right does not include the right to adjudicate under our Criminal Code, or the tariff laws, or even of parts of the Prohibition Laws of the United States, but is by the terms of the treaty expressly confined to such of our laws as "prohibit the *importation* of alcoholic beverages." (This is not such a proceeding, but one under the Criminal Code of the United States.)

The treaty, therefore, expressly confines that which may be seized upon the conditions found to the *vessel* only and that for *adjudication.* There is no right given by this treaty to seize the captain and crew for *any* purpose, or to proceed against them *under any law,* criminal or otherwise.

4. Every Consideration Which May Affect Construction of the Treaty Supports the Conclusion From the Plain Words Thereof That Great Britain Did Not Grant Any Right to Subject to Criminal Prosecution British Subjects Brought Into the United States as an Incident of a Seizure Under the Treaty.

As was said by the Circuit Court of Appeals for the Second Circuit in *The Sagatind,* 11 Fed. (2nd) 673, 675:

> "Whatever rights government derived from the treaties (with Great Britain and Norway) must be discovered in article 2 of each document. Of this article, section 1 relates wholly to search, and section 3 to the distance from shore at which all rights may and must be exercised. There remains section 2, * * *."

That section is drawn with great care and precision. There is no vagueness or ambiguity, as there should not be in a matter of such great importance to Great Britain as a departure from the inviolability of her merchant vessels on the high seas in time of peace. The only right conferred by the section is to seize *the vessel* if *the vessel* is reasonably believed to have violated the laws prohibiting the importation of alcoholic liquors, *and to institute legal proceedings against the vessel* in accordance with such laws.

There is no right conferred to proceed against those on board the vessel for violation of the laws prohibiting the importation of alcoholic beverages—and, *a fortiori*, for violation of any other laws. Of course, those on board the vessel must be brought into port with the vessel. They cannot be thrown overboard or set adrift in small boats. Furthermore, it is their duty to remain with the vessel until it is known whether she was legally subject to forfeiture, or should be returned to her owner. What their rights are when brought to an American port is dealt with below at length. For the present, it is enough to point out that, although those on board the vessel were considered and specifically referred to in section one of Article II, the treaty carefully differentiates between the vessel and those on board the vessel. Those on board may be questioned for the purpose of ascertaining whether

the vessel or they are endeavoring to import or have imported liquor into the United States, but the sole effect of suspicion regarding the conduct of those on board, under the treaty, is that it may *implicate the vessel.* For only the vessel may be seized if it is reasonably suspected of violating the law against the importation of alcoholic liquors. And after seizure the only judicial proceedings which are permitted are *against the vessel.*

In *Hennings v. United States,* 13 F. (2nd) 74, the Circuit Court of Appeals without deciding whether the crew of a vessel seized under the treaty could be proceeded against criminally, strongly intimated that the sole effect of the conduct of those on board the vessel might be to subject the vessel to forfeiture. The Court said:

> "The vessel may be seized if those on board have violated any law within the territorial jurisdiction of the United States *that would subject her to forfeiture.*" (Italics ours)

In this case the District Court had held that those on board a seized vessel could be subjected to criminal jurisdiction. The decision of the District Court was reversed on the ground that the defendants had not violated the laws of the United States specified because such laws were not in force at the place where the alleged violation took place. The other errors assigned were not passed upon.

The same intimation is contained in *The Marjorie E. Bachman,* 4 Fed. (2nd) 405, 408. In that case the vessel had been seized under the treaty and the crew arrested and held under criminal charges. Only the

libels against the vessel and the cargo were before the court but the court referred to the treatment of the crew, saying:

> "I may add that there is no evidence that the crew of the Bachman offered any resistance to the seizure, or that there was any danger in permitting them to remain on their own vessel, *and that this being so, there was no right to arrest them*, or to remove them from her. The treatment which they received and the behavior of the prize crew on the Bachman were indefensible." (Italics ours).

The treaty, then, makes a clear distinction between the questioning of those on board to ascertain what their conduct is or has been in regard to the laws prohibiting the importation of alcoholic liquors and the action which the United States may take as the result of that conduct, which is strictly limited to the seizure and adjudication of the vessel.

The reasons for such a distinction are clear. The treaty was not negotiated to apprehend and punish criminals. It cannot be doubted that Great Britain would have rejected a proposal to enlist her aid in punishing criminally British subjects who had violated or attempted to violate the customs laws or the prohibition laws of the United States—particularly if the proposal covered British subjects who had never been within the territorial limits of the United States. The attitude of Great Britain to such a proposal may be gathered from the fact that such offences are not among those for which extradition will be granted from Great Britain or Canada and were not even comprehended in the Treaty of June 6, 1924, entitled "To

Suppress Smuggling," Session Laws Pt. 2, 69 Cong. 1 Sess. p. 105. See Treaty of July 12, 1889, 26 Stat. 1508, supplemented by Treaty of December 13, 1900, 32 Stat. 1864, and Treaty of April 12, 1905, 34 Stat. 2903; Treaty of May 18, 1908, 35 Stat. 2035; Treaty of June 6, 1924, proclaimed July 17, 1925. It is not going beyond what this court will judicially notice to state that the policy of the laws forbidding the sale of alcoholic liquors is not the policy of the laws of Great Britain. The attitude, therefore, of the British Government toward persons offending our prohibition laws may be stated in the words of this court as:

> "willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offences in which it would have no interest or sympathy." *United States v. Rauscher,* 119 U. S. 407, 420.

But the end sought to be accomplished by the Treaty of May 22, 1924, was not the apprehension and punishment of criminals. It was the seizure and forfeiture of *hovering vessels* used in introducing alcoholic liquors into the United States. By such seizure and forfeiture the United States was seeking to clear its coasts of these vessels and sought the cooperation of Great Britain in extending the area in which it might seize these vessels for the purpose of forfeiting them. So far as appears, nothing more was asked and certainly nothing more was granted. The sole subject matter of Article II of the treaty was the search, seizure and adjudication of hovering vessels. It dealt only with the forfeiture of property; it did not attempt

to deal with the criminal liability or punishment of British subjects on the high seas.

Clearly the construction of such a treaty between sovereign powers by which one power permits an encroachment upon its sovereignty by the other should be attended "with the highest good faith" (*Johnson v. Browne,* 205 U. S. 309, 321), and there should be no attempt to extend it beyond its undoubted subject matter. No nation has ever maintained the right in time of peace to take foreign subjects from foreign vessels on the high seas and subject them to criminal process for violation of municipal laws. And the right to seize and forfeit a vessel does not carry with it any implication of jurisdiction over those on board. The rights granted by Great Britain in the treaty of May 22, 1924, are no more than the rights of a belligerent to visit, search and seize a neutral blockade runner in time of war. A neutral blockade runner may be seized on the high seas and both vessel and cargo may be forfeited. But no action may be taken against the crew. The law was clearly stated by Mr. Seward, Secretary of State, to Mr. Welles, Secretary of the Navy, in a letter of December 31, 1861: (See 7 Moore, 838)

> "The Department has been informally apprised that Commander Woodhull, of the United States steamer CONNECTICUT recently exacted, as a condition of the release of members of the crew of the British schooner ADELINE, captured for a breach of the blockade, that they should enter into an engagement not to be employed in a similar proceeding, in future. It occurs to this Department that, as the requirement referred to is not warranted by public law, the commanders of blockading vessels should be instructed not to exact any similar condition for the release of persons found

on board of vessels charged with a breach of the blockade.

"It may be lawful to detain such persons as witnesses, when their testimony may be indispensable to the administration of justice, but, when captured in a neutral ship, they cannot be considered and ought not to be treated as prisoners of war. Angus Smith, John Mooney and John H. McHenry, the alleged British subjects above referred to, are consequently to be considered as absolved from the obligation represented to have been required of them by Commander Woodhull."

By the treaty of May 22, 1924, Great Britain recognized the blockade against alcoholic beverages established by the Coast Guard and permitted the seizure of vessels for the express purpose of forfeiting them. This peace time blockade called for no greater rights than a war time blockade and none were granted.

We submit therefore that the treaty of May 22, 1924, dealt in a complete and exclusive way with the jurisdiction of the United States over British vessels beyond the three mile limit; that that treaty conferred only the right to seize the vessels upon reasonable ground for belief that the vessels had violated the laws against the importation of alcoholic liquors into the United States and to adjudicate the vessels only in accordance with such laws; and that no right was given to seize British subjects upon the high seas or to subject them to judicial process when *ex necessitate* they might be brought into an American port upon a seized vessel.

5. The Defendants Ford, Harris and Evelyn, Having Been Brought Within the Jurisdiction of the United States by Virtue of the Treaty of May 22, 1924, May Not Be Proceeded Against in a Manner Not Permitted by the Treaty.

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." Marshall, C. J. in *Foster v. Neilson,* 2 Pet. 253, 314.

"But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *The Head Money Cases,* 112 U. S. 580, 598-599. See also *Chew Heong v. United States,* 112 U. S. 536, 540, 565.

The Treaty of May 22, 1924, clearly was meant to define certain rights of the citizens of Great Britain both upon the high seas and in the ports of the United States as well as to give other rights to the Government of the United States. There can be no dispute as to that. So clear is the treaty as to the rights of British subjects upon the high seas that it has been made the basis of decision in the Federal courts.

In *The Frances Louise*, 1 Fed. (2nd) 1004, the court dismissed the libel because the vessel had been illegally seized in violation of the treaty since the seizure took place more than an hour's run from the shore. In *The Marjorie E. Bachman*, 4 Fed. (2nd) 405, the court also dismissed the libel holding that the place of seizure, although within an hour's run of the shore, by a disguised speed boat used to purchase liquor was not within the distance contemplated by the treaty. See also *The Over The Top*, 5 Fed. (2nd) 838, 843-844. In *The Pictonian*, 3 Fed. (2nd) 145, the treaty was regarded as affecting the substantive law of the land, although that case has not been followed upon the point there decided. See *The Sagatind*, 11 Fed. (2nd) 673; *Hennings v. United States*, 13 Fed. (2nd) 74. In *The Sagatind*, 4 Fed. (2nd) 928 (affirmed 11 Fed. (2nd) 673) the District Court specifically found that

> "The foregoing treaty extends any limitation which might exist upon the jurisdiction of the court to proceed against offending vessels * * * to such cases as may come within the terms of the treaty * * *."

The Treaty of May 22, 1924, therefore, is a law of the land, and where applicable will be enforced by this court, as stated in *United States v. Rauscher*, 119 U. S. 407, 430, 431:

> "The principle we have here laid down removes this difficulty, for under the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, 'anything in the laws of the states to the contray notwithstanding,' if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal government, which has been fully recognized. The remedy is by writ of error from the Supreme Court of the United States to the state court which may have committed such error. The case being thus removed into that court, the just effect and operation of the treaty upon the rights asserted by the prisoner would be there decided."

The case which we have just cited arose under the treaty with Great Britain of August 9, 1842, 8 Stat. 576 (since superseded by the treaty of July 12, 1889, 26 Stat. 1508). The treaty provided for the extradition by each nation upon demand of the other of fugitives from justice charged with any one of seven crimes specified in the treaty. The prisoner had been extradited from Great Britain upon a charge of murder on the high seas upon an American vessel in violation of R. S. sec. 5339. He was indicted and convicted for inflicting cruel and unusual punishment in violation of R. S. sec. 5347 upon the same member of the crew of the vessel with whose murder he had been charged in the extradition.

The case came before this court upon a certificate from the Circuit Court in New York asking whether the Circuit Court "had jurisdiction" to put the prisoner on trial for the second offence named consisting of the identical acts proved in the extradition.

This Court in proceeding to determine the question stated that the answer must lie in the construction of the treaty since that was the supreme law of the land and since the Court was called upon to enforce "*the rights of persons growing out of the treaty.*"

The treaty was expressed in affirmative terms. It provided that each nation upon *prima facie* proof should deliver to the other nation persons charged with any one of seven named crimes. The treaty did not say whether the person so surrendered might or might not be tried for any crime other than the one for which he was surrendered.

The Court found that prior to the treaty there was no right of extradition. The treaty changed this situation as to seven named crimes. But it did not intend to change the preexisting situation as to any offenses not mentioned in the treaty. Therefore, the Court concluded, it was very clear

> "That it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." (p. 420.)

The argument was pressed upon the court that when Great Britain surrendered a fugitive under the treaty he was given up absolutely and became as subject to the jurisdiction of our courts as any person within the territorial limits of the United States. But the court rejected the contention, saying:

"If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

"The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, 'and for the giving up of criminals, fugitives from

justice, *in certain cases.'* The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this examination takes place that he is guilty, and such as the law of the State of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other." (p. 421-422.)

We submit that in the present case it is very clear that the treaty of May 22, 1924, was not intended to be used for any other purpose than to seize *vessels* under certain circumstances and to adjudicate *the vessels* in accordance with the *laws prohibiting the importation of alcoholic beverages into the United States.* In the present case as in the *Rauscher* case this is "not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty * * * confirms this view of the subject." In the present case, also, it is clear that the treaty "did not intend to depart from the recognized public law which had prevailed in the absence of treaties" so far as the seizure of British ships was concerned. It was intended to change public law only to the extent specifically mentioned in the treaty—that is, to permit under certain circumstances the seizure of *British vessels* and the *adjudication of the vessels* in accordance with certain *specified* laws.

In the present case, also, it has been contended and doubtless will be contended before this Court, as in the *Rauscher* case, that when the British subjects came within the jurisdiction of the United States, not voluntarily but by virtue of authority exercised under the treaty, they became subject to the jurisdiction of our courts without condition or limitation. To this contention the *Rauscher* case is complete answer. Such a contention could only be made if upon the face of the "treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereign to that of another." But in the present case it is plain that there was no purpose whatever to transfer any individual from the jurisdiction of Great Britain to that of the United States. The sole object was to permit the seizure of vessels under limited conditions for the purpose of adjudicating the vessels in accordance with the laws prohibiting the importation of alcoholic beverages.

In the present instance the District Court has not only attempted to exercise jurisdiction over British subjects brought within its territory by virtue of the treaty, *but it has attempted to try them for an offense not even referred to or contemplated by the treaty*—the crime of conspiracy in violation of Section 37 of the Criminal Code. While it appears to us beyond question that the District Court acquired no jurisdiction whatever over the British subjects, Harris, Ford and Evelyn, by virtue of their being brought into San Francisco under the treaty, it is difficult to see how a contention can even be seriously formulated that the District Court could try them for the crime of conspiracy. The only laws referred to in any way, directly or indirectly, in the treaty as justifying any in-

terference with British subjects or British vessels beyond the three mile limit are those prohibiting the importation of alcoholic beverages. If British subjects, brought into an American port as an incident to the seizure of a British vessel for purposes of adjudicating it under the laws prohibiting the importation of alcoholic liquors, can be indicted and convicted for conspiracy to violate the National Prohibition Act and the Tariff Act they can be similarly dealt with for any offense against American laws, even though, as in case of such a conspiracy, it is not an offence mentioned in the treaty of May 22, 1924, or in the extradition treaty. See treaty of July 12, 1889, 26 Stat. 1508, as amplified 32 Stat. 1864, 34 Stat. 2903. Such a result could hardly be regarded by Great Britain other than as—in the words of this court in the Rauscher case—a fraud upon the rights of the parties and bad faith toward the country which permitted the seizure. Under these circumstances a further quotation from the *Rauscher* case is peculiarly pertinent. On page 430, the court said:

> "Two other observations remain to be made. One of these is, that the operation of this principle of the recognition of the rights of prisoners under such circumstances by the courts before whom they are brought for trial, relieves the relations between the Executive Department of the United States government and the courts of a state before whom such case may be pending, of a tension which has more than once become very delicate and very troublesome."

It is not our function to point out to this court how delicate and troublesome a tension and embarrassment to the Executive branch of the Government

may be created by any such extension of the rights conferred by the treaty of May 22, 1924, as would be necessitated by the conviction of these British subjects upon the charge against them.

Mr. Hughes has clearly indicated the embarrassment to friendly relations between this country and foreign nations which such actions produce.

The *Rauscher* case, *supra,* has become the settled law of this country. It is not necessary to do more than cite the cases which follow it.

In *Cosgrove v. Winney,* 174 U. S. 64, the defendant was extradited for larceny of a boat. He gave bail and went back to Canada. When he returned for trial he found that he had been indicted for obstructing the attachment of the same boat. Upon *habeas corpus* the prisoner was discharged. It was held that his return was not voluntary being under compulsion of the bail that after the disposal of the charge upon which he was extradited he was entitled to return to Canada.

In *Johnson v. Browne,* 205 U. S. 309, the court again applied the principle of the *Rauscher case, supra,* saying:

> "While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense."

See also *Collins v. O'Neil,* 214 U. S. 113; *Lascelles v. Georgia,* 148 U. S. 537, 542-543.

The Courts below erroneously assumed that the manner by which the defendants Harris, Ford and Evelyn came within the territorial limits of the United States had no bearing upon the jurisdiction of the United States and cited *Ker v. Illinois,* 119 U. S. 436 and cases following it in support of this view. That case, however, was decided upon the same day as *United States v. Rauscher, supra,* the opinions being delivered by the same member of this court. In *Ker v. Illinois,* Mr. Justice Miller was at great pains to point out that the principle of that case—that the illegal arrest of an individual in a foreign country and the bringing of him to this country for trial upon a criminal charge did not affect the jurisdiction of the court—did not apply to cases where the defendant was brought to this country under authority of a treaty. He said:

> "In the case of *United States v. Rauscher,* just decided, ante, 407, and considered with this, the effect of extradition proceedings under a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the treaty of 1870-74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted by the verdict of a jury

> of embezzlement; for the statement in the plea is, that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty." (Page 443.)

We therefore respectfully submit that the defendants, Ford, Harris and Evelyn, being brought into this country by authority exercised under the Treaty with Great Britain of May 22, 1924, came clothed with rights under that treaty, and that it was a violation of those rights to put them on trial for an offence, alleged to have been committed before they were brought to this country, against Section 37 of the Criminal Code. The District Court had no jurisdiction over these defendants.

PART II

THE PRESENT INDICTMENT CORRECTLY CONSTRUED DID NOT CHARGE A CRIME AND WAS CONSEQUENTLY DEFECTIVE. EITHER THE DEMURRER, OR THE MOTION TO QUASH OR THE MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED.

THE FACTS

The indictment upon which these defendants were presented for trial by the Grand Jury and upon which they have been convicted and sentenced appears on pages 5 to 18, inclusive, of the record.

The Inducing Paragraphs. The inducing paragraphs are paragraphs numbered I to VII, inclusive. Paragraph I alleges the enactment of "The National Prohibition Act" and that it "was and is now in full force and effect." Paragraph IV set forth the provisions of Section 3 of Title II of that Act.

Paragraph II alleges the enactment of the "Tariff Act of 1922" and that it "was and is now in full force and effect." Paragraph V sets forth Section 593, Subdivision (b) of that Act.

Paragraph III alleges the ratification of the Treaty with Great Britain of May 22, 1924, *and that the said treaty "was and is now in full force and effect." Paragraph VI sets forth in full Article II of the said treaty.*

Paragraph VII alleges that the Farallone Islands "were and are now owned and possessed by the United States" and sets forth their geographical position.

The Charging Paragraphs. These are paragraphs VIII (erroneously marked "VII") IX and X. Paragraph VIII charges the conspiracy; paragraph IX charges its duration; and paragraph X, the overt acts.

Paragraph VIII, charging the conspiracy, alleges that these defendants and others named did at the Bay of San Francisco conspire to

> "wilfully, unlawfully, feloniously and knowingly sell, transport, import, deliver, furnish and possess within the United States intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one percentum and more of alcohol by volume and fit for use and intended for use for beverage purposes within the United States, the said acts to be then and there unlawful and prohibited and contrary to the provisions of the Act of October 28, 1919, known as the 'National Prohibition Act,' *and the convention, agreement, and treaty between the United States and Great Britain of May 22, 1924,* and intended for use for beverage purposes in violation of said Act and said Treaty;
>
> "(b) Wilfully, unlawfully, feloniously, knowingly and fraudulently import and bring into the United States, and to assist in importing and bringing into the United States merchandise contrary to law, to wit, whiskey, champagne, wine, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for beverage purposes within the United States, the said acts to be then and there unlawful and prohibited and contrary to the provisions of Section 593, subdivision (b) of the Tariff Act of 1922, and *the convention, agreement and treaty between the United States and Great Britain of May 22, 1924,* and intended to be imported

and brought into the said United States in violation of said Acts and Treaty." (Italics ours.)

In short, the conspiracy upon which these defendants were presented for trial and convicted alleged a conspiracy "to commit certain offenses against the United States," that is to say:

(a) To do certain acts alleged to be in violation of the "National Prohibition Act" *and the treaty of May 22, 1924.*

(b) To do certain acts alleged to be in violation of the "Tariff Act of 1922" *and the treaty of May 22, 1924.*

Paragraph IX charges that the said conspiracy continued until the filing of the indictment.

The Overt Acts. The overt acts alleged are contained in four subparagraphs to paragraph X. They are: Subparagraph (a), Causing the *Quadra* to be loaded with liquor at Vancouver and to proceed to a point within twelve miles of the Farallone Islands, *"and which said distance could be traversed in less than one hour by said steamer Quadra and by the motor boats hereinafter mentioned,"* and the unloading of such liquor at said point into said motor boats and its introduction by them into the United States. Subparagraph (b), The alleged unloading of certain liquor from the *Quadra* to the motor boat *903 B* and its introduction into the United States by said motor boats. Subparagraph (c), The alleged unloading of liquor from the *Quadra* upon another occasion into a motor boat and its introduction into the United States. Subparagraph (d), The alleged unloading of liquor from the *Quadra* to the motor boat *C-55* "*within a dis-*

tance from the Farallone Islands that could be traversed by said steamer Quadra in less than one hour and within a distance from said Farallone Islands that could be traversed by motor boat C-55 hereinafter mentioned in less than one hour."

It may be noted that in describing the *locus* of two of the four overt acts alleged the Grand Jury *used the exact language employed in Article II, Section (3) of the Treaty to describe the area within which the rights conferred by that Article might be exercised.*

These defendants severally by appropriate demurrers (Rec. 19-27), motions to quash (Rec. 27-31), motions for directed verdicts (Rec. 312-322, 325, 540-541, 591), and motions in arrest of judgment (Rec. 67-69, 69-71, 71-73, 638-640, 643-645, 648-649), raised the question of the sufficiency of the indictment. But all said motions were denied. (Rec. 41, 75-76, 78-79, 322, 325, 640, 645, 649, 541, 591).

The trial judge in his charge to the jury stated:

> "If you find that a conspiracy existed, *as alleged in the indictment,* and that some one or more of the overt acts were committed, as alleged, the question then followed: Were the defendants on trial, or some of them, connected with that conspiracy as parties thereto? (Rec. 600.)
>
> * * * * * * * *
>
> "I should state to you, Gentlemen, that *when you take the indictment into the jury room* you will find that the captain and crew of the *Quadra* are the first 23 men named in the indictment." (Rec. 611.) (Italics ours).

The said errors of the District Court in permitting these defendants to be tried and convicted upon the defective indictment were properly presented to the

Circuit Court of Appeals. (Rec. 650, 739-743, 745-746, 749-752, 754-755, 755). That court said:

> "It is argued that there can be no criminal offense in violating the treaty between this country and Great Britain. This is true, but the reference to the treaty may be rejected as surplusage and the indictment still states facts sufficient to state a crime. * * * The District Court did not err in overruling the demurrer and denying the motion to quash the indictment." (Rec. 845.)

ARGUMENT

1. Conspiracy to Violate the Treaty Was an Inherent Part of the Crime Charged by the Grand Jury.

It is obvious from the foregoing analysis of the indictment that the Grand Jury (1) regarded the treaty with Great Britain as a law of the United States against which an offense could be committed, (2) regarded the treaty as an essential element in making the alleged conspiracy unlawful; and (3) charged these defendants with a conspiracy to commit offenses against certain laws of the United States specifying in each instance the treaty *in conjunction with* a statute of the United States as constituting the law to be violated.

Clearly the Grand Jury regarded the treaty as providing the essence of the charge against these defendants. The Grand Jury were presenting sixty defendants for trial. Of these, twenty-three were British subjects seized on a British vessel on the high seas at least 5.7 miles from American soil. No evidence was adduced at the trial and presumably not before the Grand Jury that these men had ever come within the generally rec-

ognized territorial jurisdiction of the United States. At the time of these proceedings it was the position taken by the United States in a number of cases—which position has since been denied by two Circuit Courts of Appeals—that the treaty itself made unlawful certain acts done beyond the three mile limit but within one hour's steaming of the coast. See *The Pictonian*, 3 Fed. (2nd) 145; *The Over the Top*, 5 Fed. (2nd) 838; *United States v. Hennings*, 7 Fed. (2nd) 488, 490, reversed 13 Fed. (2nd) 74; *The Sagatind*, 8 Fed. (2nd) 788; affirmed 11 Fed. (2nd) 673. The Grand Jury clearly drew this indictment upon this premise. They, therefore, framed both charging paragraphs of the indictment to include a conspiracy to violate the treaty with Great Britain, that is, to do certain acts wholly beyond the territorial jurisdiction of the United States on the theory that the treaty made unlawful an importation or transportation of alcoholic beverages within the distance of our coast which could be traversed in one hour either by the *Quadra* or an attendant motor boat. This is not done in a separate count or even in a separate paragraph. It is done in each of the only two paragraphs which charge the conspiracy. So that proof of the charge made by the Grand Jury would be satisfied if it were shown that the defendants conspired to bring alcoholic beverages within the distance of our coast which the *Quadra* or an attendant motor boat could traverse in one hour in violation of the treaty of May 22, 1924. This as we shall show below, does not charge a crime.

So important did the Grand Jury regard the treaty in making unlawful the conduct charged against the defendants that in alleging two of the four overt acts

it used the exact language of the treaty to place the acts as taking place within the distance from the coast of the United States which the *Quadra* and the motor boats in question could traverse in one hour.

In the face of this indictment surely no one can say that this Grand Jury understood that the treaty did not make unlawful any conduct whatever and that the allegations based upon the treaty did not state a crime, they would have presented these defendants for trial. In any event this is not a question to be determined by anyone except the Grand Jury. As stated by this Court in *Ex parte Bain,* 121 U. S. 1, 9-10:

> "The learned judge who presided in the Circuit Court at the time the change was made in this indictment, says that the court allowed the words 'Comptroller of the Currency and' to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, *upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made.* He goes on to argue that the grand jury would have found the indictment without this language. *But it is not for the court to say whether they would or not.* The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact

that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." (Italics ours.)

Similarly in the present case while it may seem to the court that the Grand Jury would have returned the indictment even if the treaty had never been made, still it is not for the court to decide whether they would have done so or not. These defendants can only be tried upon the indictment as found by the Grand Jury especially upon *all* its language found in the charging part of that indictment.

2. The Indictment as Presented by the Grand Jury Cannot Be Changed in Any Way Directly or Indirectly.

In the present case the trial court did not change the indictment or delete any portion of it. On the contrary in its charge it presented the case to the jury to determine whether "a conspiracy existed as alleged in the indictment" and furthermore instructed the jury to take the indictment into the jury room with them. However, the Circuit Court of Appeals committed a much more serious error. That Court sustained the indictment and conviction by rejecting as surplusage the references to the treaty in the charging paragraphs which made the indictment fatally defective. This was done not only after the grand jury had presented the defendants for trial upon this charge but after the trial jury had found them guilty of a conspiracy *as alleged in the indictment*. This the Court had no power to do. See *Joplin Mercantile Co. v. United States*, 236 U. S. 531.

The Constitution of the United States in the Fifth Amendment thereto provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," except in a class of cases of which this is not one.

In *Ex parte Bain, supra*, this Court had occasion to consider with the greatest care the propriety of deleting words from an indictment found by a grand jury in the light of the constitutional guarantee. In that case the indictment as presented by the grand jury and set forth in the opinion at page 4 charged that the defendants

> "and each of them made said false statement and report in manner and form as above set forth with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association, and to injure, deceive and defraud the United States, etc."

The words italicized were struck out by the lower court upon motion by the government. Upon the indictment so altered the defendant was tried and convicted. Upon petition for a writ of *habeas corpus* to this Court the petitioner was granted the writ. This Court after using the forceful language quoted above, held in the language of the headnote:

> "When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. *And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference.* The instrument, as thus changed, is no longer the indictment of the grand jury which presented it." (Italics ours.)

In *Dodge v. United States,* 258 Fed. 300, 305, (C. C. A. 2nd C.) the same rule was applied. The Court said:

> "At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for defendant at once said: 'No objection.' The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally rec-

> ognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count."

The same doctrine was applied in *Stewart v. United States*, 12 F. (2nd) 524 where the Court said:

> "At the commencement of the trial, by consent of counsel for all parties, the court struck from the body of counts 2 and 3 of the indictment, as surplusage, the words 'feloniously and' in one place, and the words 'and feloniously' in another. This action on the part of the court is now assigned as error."

Similiarly the courts have held consistently that since an indictment presented by a grand jury cannot be amended *directly* it cannot be amended *indirectly*. Thus in *United States v. Howard*, 132 Fed. 325, 344, the Court said:

> "The Supreme Court of the United States adheres very strictly to the rule that there can be no amendment of an indictment in our practice, even in matters which are immaterial, without a violation of the fifth amendment of the Constitution of the United States; and of course, it can no more be amended under the guise of importing into it outside records or documents by implication and intendment than by a more direct process, which is not permitted under the Constitution. *Ex parte Bain*, 121 U. S. 1."

In *Naftzger v. United States*, 200 Fed. 494, the Circuit Court of Appeals reversed the conviction obtained below applying the same doctrine. The Court said (p. 496):

"Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain post offices in the state of Kansas,' is surplusage, and need not be proven, and that it is sufficed if made to appear that they were stolen elsewhere from the government. *We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but having been alleged, the evidence must conform to and support the allegation.* The return of an indictment is the word of the grand jury only—a coordinate branch of the court. It is for that body, and for no other officer, to say what shall and what shall not be charged, because the fifth Amendment to the Constitution declares that:

> 'No person shall be held to answer * * * for an infamous crime, unless on a presentment or indictment of a grand jury.

In effect the government now insists on amending the indictment by striking out the words 'from various post offices in the state of Kansas.' That was what was in fact done in the case of *Ex parte Bain,* 121 U. S. 1." (Italics ours.)

In *United States v. Dembowski,* 252 Fed. 894, the indictment was defective as duplicitous, containing in one count charges of three offenses. Upon motion to quash, the government contended that it should be permitted to elect to rely on one of the offenses charged and nolle pros. the others. The court in denying this contention said (pp. 898, 899):

"It seems clear that, if the District Attorney is permitted to nolle pros. a portion of this indict-

ment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the grand jury. An amendment is, in the language of the Century Dictionary, 'The correction of an error in a writ, record, or other judicial document.' To amend is, according to Webster's New International Dictionary, 'To correct; rectify.' To amend is to 'free from error'; to 'remove what is erroneous, superfluous, faulty, and the like.' 2 Corpus Juris, 1317. In Words and Phrases, vol. 1, First Series, at p. 368 et seq., and in vol. 1, Second Series, at p. 199 et seq., numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof.

"It is, however, well established that, in view of the Fifth Amendment to the United States Constitution, which provides that no person shall be held to answer for * * *an infamous crime unless on the presentment or the indictment of a grand jury, except in certain military cases, an indictment returned by a federal grand jury cannot be amended without being first resubmitted to the grand jury for that purpose. *Ex parte Bain* 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849."

In the present case it is equally possible—indeed entirely probable—that many members of the grand jury voted to return the bill only because they believed that the treaty extended the scope of the laws of the United States including the conspiracy statute beyond the three mile limit. Others may have believed the matter doubtful but trusted that the question of law would be decided by the court and the indictment quashed if this position was erroneous. It seems impossible, from the form of the indictment, that any considerable

number of grand jurors regarded the allegations based on the treaty as unimportant and mere surplusage. Indeed so important have the courts regarded the reference made by the grand jury to the relevant law in the charging paragraph of an indictment, that where reference is made to a repealed statute the indictment is defective even though the conduct presented may violate another statute not mentioned. *United States v. Goodwin,* 20 Fed. 237.

We therefore respectfully submit (1) that these defendants could only be tried, if at all, upon the indictment drawn by the grand jury and especially upon all the language of the charging part thereof; and (2) that the grand jury in both charging paragraphs of the indictment presented a charge of a conspiracy to violate the treaty of May 22, 1924, and this language cannot be disregarded as surplusage.

3. The Treaty of May 22, 1924, Does Not Contain Penal Provisions or Make Unlawful Any Conduct Contemplated by These Defendants.

Much is said in some of the cases cited below as to whether the treaty of May 22, 1924, is "self-executing." Whatever this phrase may mean, it is wholly irrelevant to the question of whether the treaty makes unlawful any conduct not unlawful before it became effective. That question must be gathered from the provisions of the treaty.

Criminal legislation is not usually found in treaties, and there is none found in the present treaty. This treaty was made for the future; it is not linked with any legislation of the United States which may have existed when it was negotiated, or when ratifications

were exchanged. As set forth at length above, it provides, so far as here relevant, that under certain circumstances and in certain areas British vessels may be seized and taken into ports of the United States for adjudication in accordance with the laws then in force prohibiting the importation of alcoholic beverages. The treaty does not undertake to say what those laws may provide. That must be found in the laws. Congress may alter or repeal them without affecting the treaty. The treaty contents itself with stating that within the areas defined vessels may be seized for adjudication in accordance with those laws, whatever they may be.

Upon adjudication, if the laws prohibiting the importation of alcoholic liquors forbid certain conduct only within the territorial jurisdiction of the United States—see *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 122—the vessel, if it has not violated them, must be released. If Congress has the constitutional power to extend those laws to an area within ten, or twenty, or thirty miles of the coast of the United States,—See *Cunard S. S. Co. v. Mellon, supra*, 122—and does so extend them, then, upon adjudication, if a vessel, seized in accordance with the treaty, has violated them it must be forfeited. But the treaty itself does not, in any part thereof, attempt to extend the area within which existing laws shall be effective, or to require that Congress shall do so. It simply defines what rights Great Britain retains for its subjects on the high seas and what extensions of authority the United States may undertake, if it so chooses, without hindrance from Great Britain.

The vast weight of authority in the Federal Courts supports the view set forth above. The contrary view

has never been accepted by a Circuit Court of Appeals and by only two District Courts, one of which later receded from the view taken. See *Hennings v. United States, infra.*

The view that the treaty of May 22, 1924, has no effect to extend the operation of any of the Acts of Congress was first expressed by Judge Thomas, of the District of Connecticut in *The Over The Top,* (1925) 5 F. (2nd) 838, 844, 845. He said:

> "It must be noted that the treaty does not define the acts constituting an offense against the laws of the United States prohibiting the importation of alcoholic beverages. These acts are defined in the statute. If reasonable grounds exist for believing that a vessel under British registry is in fact guilty of contravening the Prohibition Law (Comp. St. Ann. Supp. 1923, par. 10138¼ et seq.), then our government may seize it if it is within the specified area, and when seized its fate may then be determined in accordance with our laws. If it is not within the specified area, it may not even be seized. But if it is within the specified area, it does not follow that it is for that reason violating our laws.
>
> "In support of its contention, the government cites and relies upon *United States v. The Pictonian,* 3 F. (2d) 145, recently decided in the Eastern district of New York, where it was held that the American-British Treaty did, as to ships of British registry, extend the operation of the criminal laws of the United States to the shifting line designated in the treaty. I have carefully read Judge Campbell's opinion and find myself unable to agree with its reasoning. The learned judge speaks of the treaty as self-executing. The significance of the phrase in this connection is somewhat obscure. As a treaty, there was no need of congressional legislation to make it effective, and

in this sense all treaties are self-executing. But if it was the intent of the government to make it a crime for a ship of British registry to unlade liquor within a sea zone on our coast, traversible in one hour, then that intent was not effectuated by the mere execution of the treaty. It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. Congress may be under a duty to enact that which has been agreed upon by treaty, but duty and its performance are two separate and distinct things. Nor is there any doubt that the treaty making power has its limitations. What these are has never been defined, perhaps never need be defined. Certain it is that no part of the criminal law of this country has ever been enacted by treaty.

"The instances just cited indicate the practice of congressional action in order to effectuate the penal provisions of a treaty, and I have no doubt that such practice is necessary in order to accomplish the purposes of the treaties. It happens that the American-British Treaty here under consideration does not declare it a crime for a British national on a ship of British registry to sell liquor for purposes of importation into this country within one hour's running distance of our shore. Nor does the treaty forbid such an act. But even if such conduct had been prohibited by the terms of the treaty, no indictment could lie for transgressing that prohibition. If an indictment could not lie for violating the direct command of the Eighteenth Amendment to the Constitution until Congress had defined the offense and proclaimed the penalty, then the fiat of a treaty would be inadequate for such a purpose. No distinction exists here between the necessary basis of an indictment and that of a libel for forfeiture. If the facts do not warrant an indictment, they do not warrant a penalty.

"In this connection it may be well to emphasize the general nature of the provisions of the Tariff Act relied upon by the libelant. In the instance at bar, we happen to be dealing with liquor, but the legislation which is invoked is by no means concerned exclusively with this commodity. A British or French ship unlading coffee or coal within the 12-mile limit, and before entry and permission to unlade, would be just as guilty of violating these acts as if she were unlading liquor. Neither her nationality nor the nature of her cargo would have any bearing on the issues.

"Whether therefore the Senate and the Executive may constitutionally enact criminal legislation by the device of a mere treaty is a question which fortunately we need not discuss. It is sufficient to conclude that the American-British Treaty did not in fact enact new criminal legislation."

This view was followed by Judge Hutcheson of the Southern District of Texas, who in *The Panama* (1925), 6 F. (2nd) 326, 327, said:

"Since I have found that the Panama was outside of the treaty limits when seized, it is not necessary for me to dispose of the government's invocation of the decision of Judge Campbell, in *United States v. The Pictonian*, that the criminal laws of this country have by the treaty been extended in their application to the limits of the treaty, except to say that I thoroughly agree with Judge Thomas, in *The Over the Top*, that this has not occurred, and that, while Congress may pass laws extending the point of unlading beyond 12 miles, and to the limits fixed in the treaty, until Congress has enacted some municipal law governing the matter, nothing in the treaty changes or

affects our laws; the treaty expressly providing merely that His Brittanic Majesty will make no objection to the seizure of British ships within the treaty limits, and a disposition of these seizures in accordance with the laws of the United States."

In *The Sagatind* (1926), 11 F. (2nd) 673, the Circuit Court of Appeals for the Second Circuit found that the views expressed above were sound. In that case the vessels were when seized twenty-two miles from the coast. There was no evidence that they had ever been nearer. The court said (p. 675):

"Thus the question is: Were Sagatind and Diamantina within the United States, or the jurisdiction of its laws, on October 11, 1924?

"We are not called on to consider the international effect of our hovering statutes, or the power of Congress to prescribe what is commonly called the 12-mile limit. Nor are we required to pass on congressional authority specifically to extend our customs, internal revenue, and prohibition laws to a distance at sea measured by the speed of a hypothetical boat, for nothing of the kind has been attempted. But we do hold that no such extension of territorial jurisdiction is created by the treaty; in that sense the treaty is not self-executing, and on this point we cannot agree with *The Pictonian* (D. C.), 3 F. (2nd) 145, nor with *United States v. Henning* (D. C.) 7, F. (2nd) 488; but we do agree with, *The Over the Top* (D. C.), 5 F. (2nd) 838, and, *The Panama* (D. C.), 6 F. (2nd) 326, and the court below."

And in *Hennings v. United States* (1926) 13 F. (2nd) 74, the Circuit Court of Appeals for the Fifth Circuit took the same view of the purpose and effect of the treaty, saying (p. 75):

"It is contended on behalf of the United States that the British-American liquor convention of May 22, 1924 (43 Stat. 1761), is self-executing, has the force and effect of a statute, extends the territorial waters within its terms, and therefore the criminal laws of the United States dealing with liquor are in force in said territory, without the need of any additional statute to make them effective. This theory found favor with the District Court. *United States v. Henning*, 7 F. (2nd) 488. *But it is only fair to say that we are advised that that court has since receded from the position then taken.*

"The British-American convention of May 22, 1924, was undoubtedly intended to facilitate the United States in the administration of the prohibition and customs laws; and it may be conceded that a treaty may be self-acting, is coequal with an act of Congress, and is to be construed by the same rules. It may be further conceded arguendo that a treaty may extend a criminal statute over territory or persons not theretofore covered by statute. But the answer to the government's contention is that the treaty relied upon does not attempt to extend the criminal laws of the United States beyond the three mile limit. Extended argument is unnecessary to demonstrate this, and it is needless to set out the pertinent parts of the treaty in haec verba for the purpose of discussion." (Italics ours.)

After giving a brief synopsis of the several articles of the treaty the court continued:

"There is nothing in the treaty from which it could be reasonably inferred that it was the intention of the high contracting parties to extend the criminal laws of the United States beyond the three mile limit. The vessel may be seized if

> those on board have violated any law within the territorial jurisdiction of the United States that would subject her to forfeiture. Except as to provisions relative to sea stores and compensation for loss occasioned by improper acts, not germane to the subject here under discussion, that is the extent of the agreement."

In the present case the Circuit Court of Appeals recognized the soundness of the contention here made. The court said:

> "It is argued that there can be no criminal offense in violating the treaty between this country and Great Britain. This is true * * *." (Rec. 845.)

We respectfully submit that the reasoning of the cases cited above and their construction of the treaty of May 22, 1924, is entirely sound. The treaty does not make any conduct unlawful or create an offense which these defendants could conspire to commit.

4. The Indictment Presented by the Grand Jury Construed, as It Must Be, Strictly in Favor of the Defendants Does Not Charge a Crime.

It is the accepted rule of criminal procedure that in case of doubt an indictment must be construed strictly against the Government and in favor of the accused. *Williamson v. United States*, 207 U. S. 425, 458.

The indictment in the present case in the charging section presents a charge of a conspiracy to violate *in the conjunctive* certain statutes of the United States *and in each case* the treaty with Great Britain. As was stated in *The Over The Top, supra*, 843:

> "It would seem that the libelant does not take the view that the acts complained of constituted an infraction of our law by the very force of the language of the statute, *else there should be no reason to invoke the aid of the provisions of* American-British Treaty." (Italics ours.)

Similarly, in the present case it is clear that the grand jury did not take the view that the object of the conspiracy complained of was made unlawful by the statutes of the United States, alone and unsupported, but only by those statutes, aided and extended by the treaty. Since the treaty does not aid and extend the operations of those statutes, the indictment must be construed as charging a conspiracy, the object of which was erroneously thought to have been made unlawful by the treaty but which was not denounced by any law of the United States. Thus the indictment on its face is defective.

The Circuit Court of Appeals sought to eliminate the defect in the indictment by rejecting the allegations regarding the treaty as surplusage and sustaining the conviction upon the remaining allegations. But this the Court could not do without altering the very basis of the charge presented by the grand jury. An examination of the cases cited by the Circuit Court of Appeals in support of its ruling—that "the reference to the treaty may be rejected as surplusage and the indictment still states facts sufficient to constitute a crime"—shows that the Court wholly failed to understand the nature of the crime charged by the grand jury.

In *Bailey v. United States,* 5 F. (2nd) 437, *Remus v. United States,* 291 Fed. 501, and *United States v. Drawdy,* 288 Fed. 567, demurrers had been filed to in-

dictments for conspiracy. The indictments in each case alleged conspiracies to do a number of acts specified. Each act was alleged to be in violation of the prohibition laws. In each case the defendants had attacked one or more of the alleged objects of the conspiracy as not stating a crime; but in each case it was conceded that, at least, one of the objects of the conspiracy charged was illegal. The courts held as was stated in *United States v. Drawdy, supra,* p. 570:

> "The indictment alleges a conspiracy to do two things, one of which was the transportation of liquor, in itself criminal, and it would not matter in the slightest whether the other thing which was included in the conspiracy was criminal. Any conspiracy which involves the doing of a criminal act is itself criminal whether it involves other things which are criminal or not."

We shall not here discuss whether the cases cited were correctly decided, though much might be said on that subject, for they are clearly no authority whatever for the position taken by the Circuit Court of Appeals. In all the cases cited it was admitted that at least one of the objects of the conspiracy as charged was unlawful. In the case at bar the very language of the charging paragraph of the indictment makes it impossible to say that any object of the conspiracy as presented by the grand jury was unlawful. In the present case the grand jury did not charge a conspiracy (1) to violate the National Prohibition Act, (2) to violate the Tariff Act of 1922, and (3) to violate the treaty. On the contrary the charge was of a conspiracy (1) to violate the *National Prohibition Act and the treaty,* and (2) to violate the *Tariff Act of*

1922 and the treaty. Thus the grand jury did not take the view that the object of the conspiracy which they were charging was rendered unlawful by any laws of the United States alone and unsupported, but only by virtue of certain statutes named and, in each case, by the aid of the treaty with Great Britain. Clearly, therefore, the grand jury had in mind a conspiracy to accomplish its objects beyond the effective scope of the statutes referred to but within the area specified in the treaty. This, at any rate, is the conspiracy charged if the indictment is construed, as it should be, strictly in favor of the defendants. And such a charge is not the charge of a crime.

The cases cited by the Circuit Court of Appeals go no further than holding, in the language of *Bailey v. United States, supra,* 438, that;

> "It is not an objection that an indictment charges more than the proof can possibly show, *if what is well alleged constitutes an offence.*" (Italics ours)

The condition attached to this statement, upon the assumption of which the statement is made, is the very point at issue in the present case. The cases, therefore, do not in any way support the Circuit Court of Appeals.

The same may be said of *United States v. Weiss,* 293 Fed. 992. That case holds that upon a second indictment for the same offense for which defendants had previously been tried the plea of double jeopardy cannot be defeated by a difference in the indictments *as to the means by which the object of the* conspiracy was to be accomplished. The court held that it was not neces-

sary to allege the means to be employed and that the conspiracy was clearly the same conspiracy for which the defendants had previously been tried whatever might be alleged as to the means by which they sought to effectuate it. Clearly the case is entirely irrelevant to the point at issue here.

We, therefore, respectfully submit that the indictment in the present case construed in accordance with the established rules of criminal procedure, did not charge these defendants with a crime; that the indictment could not be substantially altered in the charging paragraphs by the court so that it would state a crime; and that the trial and conviction of these defendants upon this indictment was erroneous and the judgment below must be reversed.

PART III

THE DEFENDANTS, FORD, HARRIS & EVELYN, HAVE NOT VIOLATED SECTION 37 OF THE CRIMINAL CODE SINCE THEY WERE AT NO TIME PRIOR TO THE SEIZURE OF THE "QUADRA" WITHIN THE JURISDICTION OR SCOPE OF THAT LAW.

THE FACTS

Ford, Harris and Evelyn, together with the other defendants have been convicted of violating Section 37 of the Criminal Code. This section declares that if any two or more persons shall conspire to violate any law of the United States and any of them shall do an overt act in furtherance of the conspiracy, all are liable to penalties.

Ford, Harris and Evelyn were, as stated above, British subjects and officers of the British ship *Quadra*. They sailed from Vancouver on September 10, 1924, and on October 12, 1924 were off the Farallone Islands. The United States contends that they were 5.7 miles from those islands on that day. There is no evidence that they were ever nearer than that.

The conspiracy for which they have been convicted was alleged in the indictment to have been made within the Northern District of California and the overt acts to have taken place there. It is not contended by the Government, and there is no evidence to show, that the British subjects, Ford, Harris or Evelyn, were ever in the Northern District of California or in the United States. Their part in the conspiracy is alleged to have consisted in *transporting the liquor to a point on the high seas beyond the territorial limits of the United*

States for delivery there to others who should import it into the United States.

We respectfully submit that the District Court erred in not granting the motion to direct a verdict in favor of these defendants (Rec. 322, 325, 541, 591) and that the Circuit Court of Appeals erred in not sustaining the assignments of error on this point (Rec. 851).

ARGUMENT

1. Section 37 of the Criminal Code Is Not Operative Against British Subjects Upon a British Vessel on the High Seas.

In *Cunard S. S. Co. v. Mellon,* 262 U. S. 100, 122, this Court defined the territory subject to the jurisdiction of the United States as follows:

> "It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographical miles. (citing cases)."

Within this territory the laws of the United States are clearly operative. In some instances those laws may be effective beyond these limits—if such is the intent of Congress—upon vessels registered under the laws of the United States or as to citizens of the United States wherever they may be, but such jurisdiction is not territorial, applying to all persons, but is based upon citizenship or allegiance to the United

States.* In *Crapo v. Kelly*, 16 Wall. 610, 624, 625, 626, this court, quoting from text writers, stated the rule as follows:

> "This rule is thus laid down by Mr. Wheaton in his treatise on International Law (8th Edition Art. 106 et seq): 'Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea.' As an illustration of the proposition that the ship is a portion of the territory of the State the author proceeds: 'Every state has an incon-

*And in *United States v. Rodgers*, 150 U. S. 249, 264, this court repeated the rule:

"It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: 'It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it

testable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects.'

"Chancellor Kent, in his Commentaries, says: 'The high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens or subjects of such a state or nation.' 'No nation has any right or jurisdiction at sea, except it be over the persons of its

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is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be waterborne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.' 6 Webster's Works, 306, 307."

See also for illustrations of personal jurisdiction over citizens for acts done abroad, *The Hamilton*, 207 U. S. 398; *United States v. Bowman*, 260 U. S. 94.

subjects, in its own public and private vessels; and so far territorial jurisdiction may be conceded as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs.'

"Wharton says: 'A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries.' 'By this (he says) may be explained several cases quoted as establishing the lex domicilii, though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears * * *In respect to principle, ships at sea and the property in them, must be viewed as part of the country to which they belong * * *.

The adjudicated cases in this country are to the same effect."

The subject was reviewed and stated by this court speaking through Mr. Justice Holmes in *American Banana Co. v. United Fruit Company,* 213 U. S. 347, 355, 356:

"It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

"No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty

alive. See *The Hamilton*, 207 U. S. 398, 403; *Hart v. Gumpach*, L. R. 4 P. C. 439, 463, 464; *British South Africa Co. v. Companhia de Mocambique* (1893), A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat. 5335. See further *Commonwealth v. Macloon*, 101 Massachusetts, 1; *The Sussex Peerage*, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *Rex v. Sawyer*, 2 C. & K. 101; *The Zollverein*, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.* 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; *Dicey*, Conflict of Laws (2d ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*"

In short, there can be no challenge to the sovereign power of the United States to attach criminal conse-

quences to acts occurring within their territorial jurisdiction, or upon their ships, or to the conduct of American citizens wherever they may be. But the power of the United States does not run beyond these limits and it will not be supposed in the absence of the most express language that in enacting a general statute Congress intended it to apply to the acts of foreigners confined to foreign territory or to foreign ships on the high seas. For this Court has recognized and stated that the broad and apparently universal prohibitions of our criminal statutes must be read in the light of the foregoing principles and their application limited in accordance with them. In *American Banana Co. v. United Fruit Company, supra,* at 357, this Court said:

> "The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.' *Ex parte Blain, In re Sawers,* 12 Ch. Div. 522, 528; *State v. Carter,* 27 N. J. (3 Dutcher) 499; *People v. Merrill,* 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as 'Every contract in restraint of trade', 'Every person who shall monopolize,' etc., *will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.* In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of

the statute so far as the present suit is concerned." (Italics ours.)

It is clear, therefore, that the words of Section 37 of the Criminal Code apparently having universal scope must be "taken as a matter of course to mean only everyone subject to such legislation, *not all that the legislator subsequently may be able to catch.*" Viewed in this light it will hardly be contended that Section 37 of the Criminal Code is to be construed as generally applicable to the conduct of British subjects on British vessels. If the master and officers of a British vessel on the high seas bound for Brazil conspired to defraud the United States by selling inferior coal to a public vessel of the United States lying there and sent a wireless message to Brazil to effect the object of the conspiracy, it would hardly be thought that they had violated any law of the United States by such conduct. See *United States v. Bowman,* 260 U. S. 94. And if these defendants had sailed from Vancouver for La Libertad and, while on the high seas, had conspired to violate the National Prohibition Act and done some act on the vessel to effect the object of the conspiracy, no law of the United States would have been violated. For it is apparent that Congress has not sought to extend its jurisdiction to the regulation of the conduct of British vessels on the high seas.

In the present case it is also clear that evidence in the record discloses no violation of Section 37 by Ford, Harris or Evelyn. They are not shown to have entered into any conspiracy within the jurisdiction of the United States or to have ever been within that jurisdiction to commit an act in furtherance of the conspiracy. At most the evidence seeks to establish

that *wholly beyond the jurisdiction of the United States and its laws* they cooperated with persons in the United States whose conduct is alleged to have constituted a criminal conspiracy. But no law of the United States was operative where they were to declare this cooperation—even if it existed—a criminal conspiracy on their part. And there is no law of the United States or decision of this Court to warrant the wholly novel proposition that through the mere fact of a relationship to persons within the United States the criminal statutes of the United States reach out beyond its territorial jurisdiction and brand the conduct of British subjects on a British vessel on the high seas as criminal.

District Judge Morton in *The Marjorie E. Bachman,* 4 Fed. (2nd) 405, 408, referring to the dicta of the Circuit Court of Appeals in *Latham v. United States,* 2 Fed. (2nd) 208, said:

> "There can be no doubt of the correctness of the decision in that case; the instructions of the District Judge under which the conviction was returned can hardly be questioned. But the view of the Circuit Court of Appeals that the statute of the United States, which makes all persons aiding and abetting in a misdeameanor guilty as principals, reaches beyond the territorial limits of this country, and makes guilty under our laws persons who in foreign jurisdiction aid and abet in the commission of misdeameanors here, is a wide departure from what I have supposed the law to be. Mr. Fish, Secretary of State of the United States, wrote to the British Minister under date of January 22, 1875; 'We have always understood and asserted that pursuant to public law no nation can rightfully claim jurisdiction at

> sea beyond a marine league from its coast'. See Moore's Dig. Internat. Law, p. 731. And this seems to be the general understanding of the matter. Moreover, that statute makes no reference to vessels and does not undertake to make them forfeitable for offenses against our law committed by those on board them."

From whatever angle the present question is approached the problem always remains whether Section 37 shall be interpreted, as this Court has declared that all criminal statutes should be interpreted, in accordance with recognized international law.

The fact is that these defendants were never within the jurisdiction of the United States. And the further fact is that this court has never been willing to hold that a foreign subject, never within the jurisdiction of the United States, could be guilty of a criminal conspiracy against the United States even when cooperating with American citizens who were so guilty. In *United States v. Bowman*, 260 U. S. 94, 102-03, this Court after deciding that American citizens on an American ship on the high seas could be guilty of a conspiracy to defraud the United States, said:

> "The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial."

Nor can the fundamental and novel character of the position which the Government must assume to support the conviction of Ford, Harris and Evelyn be altered or successfully obscured by a resort to the

language of legal fiction through the contention that these defendants were *constructively present* within the jurisdiction.

> "The doctrine of constructive presence, being a mere fiction of the law, should be applied with caution. In extending the rights of this country we are invading those of other nations. *The question is really one of international law.*" *The Marjorie E. Bachman, supra,* 408. (Italics ours.)

There is no more warrant in the decided cases for extending the scope of Section 37 beyond the jurisdiction of the United States through the fiction of constructive presence than to do so directly.

The cases of *Hyde v. United States,* 225 U. S. 347, and *Brown v. Elliott,* 225 U. S. 392, referred to by the Circuit Court of Appeals are no authority for extending the jurisdiction of the conspiracy statute to foreigners upon foreign soil or upon foreign vessels on the high seas. No such question was there involved. So far as here relevant, those cases involved only the question of the venue for the trial of defendants all of whom had within the limits of the United States entered into the relation of conspirators and, at least, one of them had, in each case, committed within the United States an overt act. The issue was expressly narrowed by the court to the question of venue:

> "The question, therefore, is presented as to the venue in conspiracy cases, whether it must be at the place where the conspiracy is entered into or whether it may be at the place where the overt act is performed, the Sixth Amendment of the Constitution of the United States requiring all criminal prosecutions to be in the 'district wherein

the crime shall have been committed'. *Hyde v. United States, supra,* 357.

Thus in the cases referred to there was no doubt that all the defendants had acted throughout the conspiracy within the jurisdiction of the United States. The sole issue was as to where they could be tried. This court held that since all incurred guilt when one of them committed an overt act, the crime might be regarded as having been committed by all at the place where the overt act occurred, whether or not all had been present there. The court said:

> "The Constitution of the United States (the Sixth Amendment) is not intended as a facility for crime. It is intended to prevent oppression, and its letter and spirit are satisfied if where a criminal purpose is executed the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them but for the execution of them. The venue of his trial is thus made by the *criminal himself,* not determined by reasons or interests which may be adverse to him and used to his injury." *Brown v. Elliott,* 225 U. S. 392, 402. (Italics ours.)

It will thus be seen that these cases are entirely predicated upon the fact that the defendants *had all incurred criminal liability.* They had, within the jurisdiction of the United States, entered into a relationship made criminal by its laws when translated into action by any one of the conspirators. *These cases, therefore, are founded upon the existence of the very fact which does not exist in the present case.* For

in the present case no law of the United States reached to these defendants to brand any conduct of their's criminal. This is no case where a constructive presence "may be assigned to conspirators as well as to other criminals"; it is rather the other way around—it is only by assigning a constructive or fictitious presence to these defendants that they become fictitiously or constructively conspirators. *Hyde v. United States, supra,* and *Brown v. Elliott, supra,* are in no sense authority for any such proposition as that. If they had been, this court would not have been so careful to reserve the point in deciding *United States v. Bowman, supra.*

It should also be pointed out that in *Hyde v. United States* and *Brown v. Elliott, supra,* there were vigorous dissents by four members of this court, based upon the application of the fiction of constructive presence even to the extent to which it was involved in those cases. Mr. Justice Holmes, who wrote both dissenting opinions observed:

> "To speak of constructive presence is to use the language of fiction and so to hinder precise analysis." (p. 386.)

And again:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." (p. 391)

It is clear, therefore, that *Hyde v. United States* and *Brown v. Elliott,* lend no support whatever to the proposition that Section 37 should be extended beyond

the jurisdiction of the United States to the conduct of British subjects on British territory—for if the statute be applied to these defendants it would have to apply to British subjects in England, or India, or Australia equally. In those cases there was no question that Section 37 had been violated within the jurisdiction of the United States; the only question was where the trial might be had. They, therefore, do not aid the government in any way.

Nor is the government aided by the principle that the laws of a sovereign are violated by acts which take effect within the jurisdiction even though the forces are set in motion from without, as where a shot fired from beyond the boundary lines kills a person within the jurisdiction. See *Strassheim v. Daily,* 221 U. S. 280; and compare *In re Palliser,* 136 U. S. 257; *Benson v. Henkel,* 198 U. S. 1; *Burton v. U. S.,* 202 U. S. 344, 383, which raise questions of venue only. In such a case it needs no fiction to say that a crime has been committed. For the act, wherever begun, was continued within the jurisdiction and produced its effect there. A situation denounced by the laws of the sovereign was produced within the territorial jurisdiction by the act of the defendant. The law was thus violated and it could not avail the actor when apprehended to contend that he had not been present in the jurisdiction. It was not his presence but his act which brought criminal consequences upon him.

But in the present case the prosecution of these defendants is not based upon any act of theirs which, in fact, took effect in the United States in violation of law. They are prosecuted solely because of their relation to persons in the United States who are charged with criminal acts. And thus we return once more to

the fundamental and inescapable problem, what law of the United States applied to these British subjects on a British ship on the high seas and made that relationship criminal? Clearly there was none.

We submit, therefore, that where the proof offered by the Government disclosed that the defendants Ford, Harris and Evelyn had never been within the scope of Section 37 of the Criminal Code and had never violated its provisions, the District Court should, as requested, have directed a verdict in their favor. For that Section of the law alone could be the basis of these defendants' guilt, whatever the court may have thought of the morality of their conduct. (See Rec. 43, 44, 45). As this court said in *American Banana Co. v. United Fruit Co., supra,* 357:

> "For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, *however contrary to the ethical and economic postulates of that statute.*" (Italics ours)

PART IV

THE DISTRICT COURT ERRED IN RECEIVING IN EVIDENCE THE CARGO AND PAPERS SEIZED ON THE STEAMSHIP "QUADRA" BY THE UNITED STATES.

THE FACTS

At the outset of the trial all of the five defendants who are here petitioners before this court, joined in a motion to exclude and suppress evidence seized by the United States on board the Steamship *Quadra*. (Rec. p. 32 et seq.) This evidence consisted of portions of the cargo of that vessel and also papers seized on board the vessel. The motion stated the longitude and latitude of the *Quadra* at the time of the seizure as taken by her officers and alleged that the vessel was thirteen and one-half miles from the nearest territory belonging to the United States, the Farallone Islands. The motion further stated that neither the *Quadra* nor any of the motor-boats referred to in the indictment could traverse the said distance in one hour. This motion was supported by the affidavit of Captain Ford of the *Quadra*, one of the defendants. (Rec. p. 38.)

In opposition to the motion, the United States introduced an affidavit by Captain C. F. Howell, of the U. S. Revenue Cutter *Shawnee*. (Rec p. 39.) This affidavit stated no facts as to the longitude or latitude of the *Quadra* at the time of seizure, nor as to the speed of this vessel or any of the motor-boats. It merely stated that at the time of seizure the *Quadra* was less than twelve miles from territory of the United States and alleged the general conclusion that the vessel was at

a distance from the coast of the State of California that could be traversed in less than one hour by the vessel and the motor-boat *C-55*.

The court overruled the motion of the defendants (Rec. p. 42 et seq.), stating that for the purposes of the opinion the court would assume that the affidavit of Captain Howell of the revenue cutter stated the facts.

At the trial it was not contended by the United States that any intention existed to import liquor by means of the *Quadra* herself. The Government contended that the intention was to import liquor by means of the motor-boat *C-55*, and that therefore the distance which could be traversed by this motor-boat in one hour was the distance within which seizure of the *Quadra* might be made in accordance with the treaty of May 22, 1924. The Government produced the witness, August Anderson, for the purpose of proving the speed of the motor-boat *C-55*. This witness testified that he made a test of the motor-boat *C-55* on February 17, 1925 (Rec. p. 163); that the boat was not laden at the time of the test; that the test was in the waters of the bay of San Francisco; that he measured the distance over which he tested the vessel by measuring off the distance on a chart by a scale of the chart with dividers and in no other way. (Rec. p. 164.) On the basis of this test the witness said the speed of the motor-boat was 6.6 knots per hour. (Rec. p. 163.)

It further developed from the testimony of the Government witnesses Howell and Morse that at the time of the seizure the *Quadra* was in the open waters of the Pacific Ocean off the Farallone Islands. (Rec. 93, 147.) They testified that she was 5.7 nautical miles from the nearest land. (Rec. 106, 139, 144, 146.)

It further developed that at the time of the seizure the motor-boat *C-55* had on board two men and a cargo of 89 sacks of wine. (Rec. 95, 185.)

The defendants objected to the testimony of the witness Anderson, and to the introduction into evidence of property seized from the *Quadra,* and further, at the conclusion of the evidence moved to strike from the record the evidence seized on the *Quadra.* (Rec. 160, 162, 182-185, 316-317). The court overruled these objections and the action of the court was assigned as error. (Rec. 671, 685, 693, 737-739.)

The Circuit Court of Appeals sustained the position of the District Court. (Rec. 851.)

ARGUMENT

1. The Trial Court Erred in Overruling the Defendants' Motion to Suppress the Evidence Seized From the "Quadra," Since the Only Facts Before the Court Showed That the Vessel Had Been Seized in Violation of the Treaty of May 22, 1924.

By the treaty of May 22, 1924, Great Britain permitted the seizure of her private vessels beyond the territorial limits of the United States for adjudication in accordance with the laws in force in the United States prohibiting the importation of alcoholic beverages.

Section 3 of Article II provided that the rights conferred should

> "not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in *one hour* by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is

> intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be *the speed of such other vessel* and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised." (Italics ours.) 43 Stat. L. 1761.

It would seem clear that under the treaty the United States has no right to make any disposition whatever of property seized in accordance with the extraordinary rights conferred by the treaty *until the seized vessel has been adjudicated and condemned under the laws prohibiting the importation of alcoholic beverages.* This is the sole purpose for which the treaty allows seizure to be made and until that purpose has been carried to conclusion the United States is merely the custodian of the property for the British owner and may only take such action in regard to it as is necessary to adjudicate it under the laws prohibiting the importation of alcoholic beverages. The reasons which lead to this view of the plain language of the treaty are discussed at length in Part I of this brief and need not be repeated.

However this may be, it is certainly the law that when the United States does proceed to libel the seized vessel in accordance with the laws prohibiting the importation of alcoholic beverages, they must establish *at the very outset* that the seizure was made within the area prescribed by the treaty.

> *The Sagatind*, 4 Fed. (2nd) 928, aff'd. 11 Fed. (2nd), 673.
> *The Over the Top*, 5 Fed. (2nd) 838.
> *The Marjorie E. Bachman*, 4 Fed. (2nd) 405.

If, therefore, in taking the very steps to dispose of the seized property mentioned in the treaty, the United States must prove the propriety of the seizure, it cannot be that the United States may make any other unauthorized disposition of the property without proving the propriety of the seizure. Otherwise the property might be disposed of and be lost to the owner without any opportunity being afforded to determine whether it had ever been seized rightfully—to say nothing of whether it was held rightfully. The highest good faith required that the United States justify the confidence reposed in them by Great Britain by making no disposition whatever of seized property without establishing that the seizure was made in strict conformity with the treaty.

The action of the District Court in the present case illustrates the grave danger of abuse of the rights conferred by the treaty which follows the failure to require proof that the seizure was in acordance with the treaty before permitting any disposition of the property.

At the outset of the trial these defendants, including the captain and officers of the *Quadra,* in whose legal possession the *Quadra,* her papers and cargo were at the time of seizure, moved to suppress the evidence and stated facts which, if true, showed that the vessel was illegally seized. In reply to this motion and the acompanying affidavit, the Government stated *no evidentiary facts whatever upon which the court could determine the issue raised* but introduced an affidavit by the Captain of the Revenue Cutter which merely recited a conclusion of law in the language of the treaty.

Upon this record the trial court erroneously refused to exercise its proper judicial function but denied the motion *assuming that the legal conclusion stated in the*

affidavit of the Government official was correct. Instead of requiring the Government to state facts upon which the court could base judicial action, the court substituted its faith that the officer of the Revenue Cutter knew the law and acted in accordance with it.

The facts subsequently developed show the unfortunate result of this course. They show that at the time when the court was thus led to rule that the seizure had been made "in strict accord with the treaty with Great Britain," (Rec. p. 58)—January 8, 1925—*neither the court nor the Government had the slightest knowledge of the essential facts which determined whether or not the seizure had been in acordance with the treaty.* For by the Government's own testimony the speed of the motor boat which admittedly determined the area within which the seizure might be made, *was not even tested until February 17, 1925.* (Rec. p. 163.) Therefore when the Government was alleging in January that the seizure was within the treaty limits and when the court was assuming that this legal conclusion was correct, the Government had not the slightest evidence of fact upon which to base its conclusion.

If the trial court had not permitted itself to be misled into abdicating its judicial function and had demanded knowledge of facts instead of faith in conclusions of law as the basis of its decision, it would have developed the fact that the Government did not know whether the vessel had been legally seized or not and might have avoided the later error into which it was led and which is discussed immediately below.

We therefore submit that the trial court committed serious error in overruling the defendants' motion to suppress the evidence upon the facts before the court.

2. The Evidence Adduced by the Government at the Trial Relating to the Speed of the Motor Boat "C-55" Did Not Cure the Error of the Trial Court in Overruling the Motion to Suppress the Evidence; And Action of the Trial Court in Subsequently Admitting Portions of the Cargo of the "Quadra" Into Evidence Was Further Error.

At the trial the evidence tended to show that the *Quadra* at the time of seizure was in the open waters of the Pacific Ocean at least 5.7 miles to the northwest of the Farallone Islands. At that time the motorboat *C-55* was alongside the *Quadra* laden with 89 sacks of wine and with two men aboard. There was no evidence of weather conditions or the state of the sea beyond the fact that there was an east offshore wind. (Rec. 341.)

There was also evidence to show that on February 17, 1925, four months after the seizure, a Government witness ran the *C-55* light, in the waters of San Francisco Bay between two points indicated on a chart. The witness measured the distance on the chart with dividers as 5,400 yards. There was no evidence of the time taken by the *C-55* to cover this course but the witness testified that at this trial she made a speed of 6.6 knots per hour. (Rec. p. 163-164.)

Upon this record the trial court overruled defendants' motion to exclude the evidence from the *Quadra*, and at the close of the trial to strike it from the record, the defendants having contended that there was no evidence to show that at the time of the seizure the *Quadra* was within a distance from the United States which *at that time and under the conditions then existing* the *C-55* could have traversed in one hour.

The trial court and the Circuit Court of Appeals took the position that it was immaterial what distance the *C-55* could traverse in one hour under the conditions prevailing at the time of the seizure. The Circuit Court of Appeals said:

> "We think this construction of the treaty is unwarranted by the language used: 'The rights conferred by this article shall not be exercised at a greater distance from the Coast of the United States its territories or possessions than can be traversed in one hour by the vessel.' We do not find any qualifying words after 'vessel' such as 'when loaded' or 'under conditions of wind and tide prevailing at the time of seizure.' We should not read into the treaty limitations which have not been written therein. The Courts of this country should be careful not to fritter away by construction concessions secured by the State Department for the purpose of combatting the rum running abuse. The treaty, fairly construed, embodies the consent of Great Britain that her ships may be searched and seized under proper conditions within such a distance from our shores as can be traversed in an hour by any of the boats on which they discharge their liquor. The evidence shows that the 'C-55' can traverse 6.6 knots within that time. The 'Quadra' was therefore subject to search and seizure if she was within 6.6 miles of the Farallones." (Rec. p. 854.)

This view of the meaning of the treaty is clearly erroneous and contrary to the well considered views of other Federal courts. Justice Thomas, in a learned opinion considering the above treaty, passed upon this identical situation, and declared in *The Over the Top,* 5 Fed. (2nd) 838, 844, as follows:

"There is absolutely no evidence in the record as to how far the sea sled could travel in an hour and in the dark with 25 cases of liquor and three men aboard as on the night it left the schooner. Over the Top with wind, weather and tide as it in fact existed on the night in question.

"As we are dealing here with fines and forfeitures, I cannot assume that this language was intended to cover an hypothetical case; that the seizure would be treated as legal if acomplished at a point constituting the greatest distance which the unladen ship could traverse in one hour at her maximum speed under the most favorable conditions of wind and tide. It seems to me that a rational construction requires us to measure the distance by the actual speed of the boat acomplished from the point of capture to the nearest available point on the coast in normal wind and tide and under the same conditions as pertain at the time of the seizure. Nor can I see any reason for applying any different rule when the distance is to be measured by the speed of the carrier from ship to coast. *It is the speed of the boat conveying liquor, and when it is engaged in conveying liquor to the United States, that must be determined. When conveying liquor, her speed may be below that of her speed when empty.*" (Italics ours)

The foregoing opinion solidly and soundly supports our position that the rights exercised by the United States under the treaty were not shown to have been exercised at a distance from the shores thereof which could be traversed by the *C-55* in one hour.

The case of *The Sagatind*, 11 Fed. (2nd), 673, 674, indicates the necessity that the speed of the claimed contact boat must accord with the principles laid down

by Judge Thomas in the *Over the Top* case, *supra.* Therein Justice Hough declares:

> "The Coast Guard 'Sea Sled' is said to have made under favorable conditions 33 miles an hour, but as to what her speed was in the open sea with a cargo of 25 cases of liquor aboard there is no evidence worth mentioning."

It can hardly be doubted that the cases cited above state the correct meaning of the treaty. It cannot be that the rights of British vessels on the high seas are made to depend on a theoretical speed of a motor boat which cannot be known to anyone at the time of the seizure. The seizure may not be made unless the seized vessel is within a distance of the coast which the attendant vessel can traverse in one hour. This clearly must mean can traverse in one hour *at that time, at that place and under those conditions.* The Government obviously cannot seize within a distance which the boat could traverse one hour with another engine. Similarly it cannot alter any other conditions existing at the time of seizure, but the evidence must tend to prove the speed under all the actual conditions.

The test made by the Government in the present case was not under conditions which were shown to approximate even remotely the conditions of sea, tide, current, wind, cargo and crew which affected the *C-55* at the time of seizure. The test, therefore, was no evidence whatever that the *C-55* could have traversed the distance from the point of seizure of the *Quadra* to the Farallone Islands in one hour.

> "An experiment introduced for the purpose of proving that an alleged result is obtained by a

certain act or operation, considered as existing in the case, should not be permitted unless the condition and circumstances under which the experiment is made are similar to those shown actually to have existed in the case." 10 *Ruling Case Law* (*Evidence* Sec. 190) 1002.

"In order that an experiment shall possess sufficient probative value to warrant the admission of evidence thereof, it is necessary that the circumstances under which the experiment is made shall have been similar to the circumstances prevailing at the time of the ocurrence involved in the controversy, *and if the conditions were dissimilar in an essential particular the evidence is rejected, especially if the conditions were more favorable to the party offering the evidence.*" 22, *Corpus Juris* (*Evidence*, 852), 758. (Italics ours.)

If the defendants' contention in regard to the construction of the treaty is sound, the prejudicial character of the error of the District Court is conceded by the Government. In its brief in opposition to the petition for certiorari in this case the Government said:

"If the seizure were unlawful because in contravention of the treaty, there might be merit in petitioners' claim that the admission at the trial of testimony relating to the seizure constituted reversible error, for that testimony undoubtedly had a vital bearing on the question of the defendants' innocence or guilt." (P. 19.)

We therefore respectfully submit that the action of the trial court referred to above was prejudicial error as to all these defendants and that the judgments as to them should be reversed.

PART V

THE LOWER COURTS ERRED IN PERMITTING EVIDENCE TO GO TO THE JURY OF THE IMPORTATION OF LIQUOR FROM THE STEAMSHIP "NORBURN" SINCE THAT IMPORTATION WAS NOT CONNECTED IN ANY WAY WITH THE CONSPIRACY AS CHARGED BY THE UNITED STATES ATTORNEY OR THE TRIAL JUDGE.

THE FACTS

Over the objection of the defendants the Government witness Sam Crivello was permitted to testify that in the latter part of April or the first part of May, 1924, he was employed by the defendant Quartararo to carry liquor from the *S. S. Norburn* to Oakland Creek, in the motor boats *California* and *Skidaddle*. (Rec. 217-225, 230-232.)

As to the other steamships referred to in the testimony of the witnesses for the Government evidence was introduced to show that these vessels had a common owner; that they all left the port of Vancouver laden with a cargo of liquor destined or consigned to Buenaventura, Columbia, or La Libertad, San Salvador, and that the shipper of all these cargoes was the Consolidated Exporters' Corporation, Limited, a Canadian Corporation of which the defendant Belanger was alleged to be a director. (See opinion of the Circuit Court of Appeals, Rec. 848.)

As to the *S. S. Norburn*, however, no evidence whatever was introduced as to the ownership of the vessel, the ownership of the cargo, the character of the cargo or any facts which connected that vessel with the al-

leged conspiracy as shown by the proof offered by the Government.

The introduction of the evidence regarding the transportation of liquor from the *S. S. Norburn* was duly assigned as error by these defendants. (Rec. 700-707.)

The Circuit Court of Appeals sustained the action of the District Court in admitting this evidence. (Rec. 858-859.)

ARGUMENT

1. The Importation of Liquor From the S. S. Norburn Was Not Connected in Any Way With the Conspiracy Submitted to the Jury.

At the opening of the trial, counsel for the Government outlined the conspiracy which the Government proposed to prove against these defendants as follows:

> "Now, the particular charge, gentlemen, that is made against these individuals * * * is a charge of conspiracy and the evidence that the Government will present will show you that there was a combination of individuals who are on trial here before you, and as part of that combination, in *September of 1924*, the ship 'Quadra,' owned by the Canadian Mexican Shipping Company, Ltd., of Vancouver, was loaded with a full cargo of liquor, * * * and the cargo was owned, as the evidence will show, by the Consolidated Exporters, Limited, of Vancouver; that in *September, etc.*" (Rec. 90.) (Italics ours.)

At the conclusion of the evidence the trial court in instructing the jury stated the scope of the conspiracy which the Government had [redacted] to prove as follows:

"The indictment in effect charges that a certain corporation formed in a foreign country, to-wit, the Dominion of Canada, entered into a plan by which liquor was to be shipped at sea ostensibly and under the provisions of her manifest, for delivery in another foreign country, to-wit, Mexico. It is charged that that was a mere cloak or blind and that the real intent and purpose of the shipping of the liquor by various vessels plying out of the harbor of Vancouver was to lie off the coast of the United States and to land the liquor illegally and unlawfully upon our shores.

"It is then charged that in effect Captain Ford, the Chief Officer, Mr. Harris, the Second Officer, Mr. Evelyn, and members of the crew of the 'Quadra' loaded upon that vessel a large quantity of intoxicating liquor, the manifest providing that the liquor was for delivery at La Libertad, etc." (R. 601-602.)

The conspiracy, therefore, both as outlined by counsel for the Government, as developed by the testimony of the Government, and as stated by the trial court was that the defendants entered into a plan by which the Consolidated Exports, Ltd., a Vancouver Corporation, was to ship liquor in certain vessels ostensibly for delivery in Mexico or Columbia, but in reality to be delivered to various motor boats plying out of the harbor of San Francisco. These vessels were the *Malahat,* which left Vancouver May 23, 1924, the *Coal Harbor,* which left the same port July 5, 1924, and the *Quadra,* which left the same port on September 9, 1924. The Government with great care introduced evidence regarding the ownership of these vessels and their cargoes and showing the further fact that they cooperated with one another while lying off the coast of the United States.

The Government, however, did not introduce any evidence whatever showing any relationship between the *S. S. Norburn* and any of the other vessels either in respect to the ownership of the vessel or its cargo or with respect to the movement of that vessel. It remained entirely unconnected with the conspiracy charged against these defendants.

2. The Trial Court Admitted the Evidence Upon the Authority of a Decision Which Was Subsequently Overruled by the Circuit Court of Appeals.

Just prior to overruling the objection of the defendants to the testimony of Sam Crivello in regard to the *Norburn*, the Court had overruled a similar objection of the defendants in regard to the testimony of another witness. The Court said:

> "Basing the ruling on various decisions of the United States Courts of Appeal throughout the country, I held in the case of this very man Terry, whose name is exceedingly familiar to me, and I think he was out on bail from a conviction in this Court—I held in his very case that it was competent on a charge of conspiracy to land liquor to show other instances as bearing upon the general scheme or purpose." (Rec. 207.)

And later in referring to his ruling upon the testimony relating to the *Norburn*, the Court said:

> "If there was *a* conspiracy between the defendant Quartararo and this defendant (Sam Crivello) it would be sufficient to convict" (R. 222).
> "The thing after all is the conspiracy and the defendants having been apprised that the Government charged that they had entered into a con-

> spiracy to violate certain statutes that any acts which were in violation of those statutes and which concerned *any* of the defendants and any other person, or more than one person, *so that it would constitute under the law a conspiracy is admissible*" (R. 224). (Italics and parentheses ours)

The Court, therefore, admitted the testimony upon the supposition that it was proper in a trial for conspiracy to introduce evidence of *any conspiracy* to violate the statutes mentioned in the indictment by any of the defendants whether or not that conspiracy was connected in any way with the conspiracy for which the defendants were on trial. This ruling the Court based upon his own decision in the case of *Terry v. United States.*

The decision of the District Court upon which he based his ruling in the present case was reversed by the Circuit Court of Appeals, *Terry v. United States,* 7 F. (2d) 28. In that case several defendants were indicted for a conspiracy to violate the National Prohibition Act.

> "Upon the trial the court admitted testimony, over objection and exception, tending to prove that, about 6 weeks prior to the indictment at Allen's Wharf, the plaintiff in error employed one Frohn to transport several barrels of intoxicating liquor from Bodega Bay to a ranch house in the vicinity of Petaluma; that at or about the same time the defendant Zucker rented a barn from one Sousa in that vicinity, and that 9 barrels of intoxicating liquor were stored therein. There was no testimony of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident or transaction." (7 F. (2nd) 28, 29.)

The Circuit Court of Appeals found that the action of Judge Partridge in admitting this evidence was error of the most prejudicial character and held, "for error in the admission of testimony as to the Bodega Bay incident, and the charge of the Court in relation thereto, the judgment is reversed and the cause is remanded for a new trial." In the course of its opinion the Circuit Court of Appeals said:

> "Furthermore, the scope of the conspiracy must be gathered from the testimony and not from the averments of the indictment. The latter may limit the scope but it cannot extend it. * * *
>
> "In ruling upon the admission of testimony, and in the charge to the jury, the court proceeded upon the theory that some of the defendants might be convicted of one conspiracy and some of another; * * * The rulings admit of no other construction.
>
> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment. *United States v. McConnell* (D. C.) 285 F. 164.
>
> "In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime. For these reasons the rulings complained of are erroneous and call for a reversal. Proof that the plaintiff in error was guilty of another crime was in itself prejudicial, and an instruction that he might be convicted of a crime not charged in the indictment cannot be sustained." (7 F. (2d) 28, 29, 30.)

The Circuit Court of Appeals subsequently reaffirmed this view of the law in *Crowley v. United States*, 8 F. (2d) 118.

3. The Circuit Court of Appeals Sustained the Action of the Trial Court Upon a Misapprehension of Fact.

In sustaining the action of the District Court in admitting evidence regarding the "Norburn incident" the Circuit Court of Appeals said:

> "Within these rules (i. e., the rules laid down by the Terry case) we think the testimony as to the 'Norburn incident' was admissible. The Government explicitly proved that *prior* to Crivello's reception of liquor from the 'Norburn,' he had been employed by Quartararo to receive and transport liquor from various vessels and to deliver it to Quartararo at Oakland Creek. Here was clear proof of a conspiracy between these two defendants within the allegations of the indictment. *The jury was warranted in finding from the evidence* that either Belanger and his corporation were original parties to the conspiracy, or that they and the officers and crew of the Quadra adhered to it subsequently." (Rec. 859). (Italics and parentheses ours.)

The testimony of the witness Sam Crivello was clearly misunderstood by the Circuit Court of Appeals. That witness testified on page 217 of the record that he was *first* employed by Quartararo in April or May, 1924, and that this first employment was to transport liquor from the *S. S. Norburn*. There is no evidence whatever in the record of any connection between Sam Crivello and Quartararo or any other de-

fendant after the "Norburn incident" until August, 924, at which date Crivello testified that *he went out* o the *S. S. Malahat* (Rec. p. 225). The witness fur- her testified that he did not meet the defendant C. H. Belanger until September, 1924 (Rec. p. 227).

The record therefore shows that the transportation of liquor from the *Norburn* was an isolated incident occurring prior to the time when any of the ships owned by the Canadian Corporation had left Vancou- ver. There is no evidence whatever to show that at he time these ships arrived off the coast of the United States Crivello was employed by Quartararo or that he had any connection with him, and there is no evi- dence to show any subsequent connection between Quartararo and Crivello until August, 1924.

If the Circuit Court of Appeals had understood the above constituted the evidence, and *all* the evidence, in he record of the conduct of Sam Crivello and Quar- tararo prior to August, 1924, the court could not have concluded that "the jury was warranted in finding from the evidence that either Belanger and his cor- poration were originally parties to the conspiracy (to import liquor from the *Norburn* in April or May, 1924) or that they and the officers and crew of the *Quadra* adhered to it subsequently." There was not the slight- est basis for even an inference that Belanger or the corporation had the slightest knowledge of the trans- action relating to the *Norburn*, or that when the "Nor- burn incident" had been closed in May, 1924, there was any conspiracy between Quartararo and Crivello to which anyone could adhere.

If the Court had understood the facts there is no reason to doubt that it would have taken the same posi- tion which it took in *Terry v. U. S., supra*, where (first

quoting a portion of the trial judge's charge) the Court said:

> "'In this case, therefore, even though you may find that there was no open or expressed declaration of purpose on the part of these defendants or the other parties concerned to unite in doing the acts charged, yet if you find that the acts of the parties were committed or accomplished in a manner or under circumstances which, by reason of their situation at the time and the conditions surrounding them, *give rise to a reasonable and just inference that they were done as the result of a previous agreement then you are justified in finding that a conspiracy existed between them to do those acts.*'
>
> "The italicized portion of the instruction does not contain a correct statement of the law.
>
> "It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; and, where that proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence. *United States v. Lancaster* (C. C.), 44 Fed. 896, 904, 10 L. R. A. 333." (p. 30)

Conspiracy indictments are so notoriously open to abuse that this Court will surely look with disfavor at any tendency to relax already inadequate safeguards of the rights of defendants in such cases. The action of the trial court in the present case tended to permit the very abuse of the conspiracy statute complained of

by the Conference of the Senior Circuit Judges, held on June 9 and 10, 1925, upon call of the Chief Justice of the United States under the Act of September 6, 1922. The first recommendation of the Conference was in part as follows; (See letter of Mr. Chief Justice Taft to Circuit Judges and District Judges of the United States dated June 16, 1925.)

> "A. We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.
>
> "Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant."

We respectfully submit, therefore, that the error of the Trial Court in admitting the testimony as to the "Norburn incident" was manifest and prejudicial to all the defendants and the judgments against them should be reversed.

PART VI

THE JUDGMENT AS TO THE DEFENDANT QUARTARARO SHOULD BE REVERSED ON ACCOUNT OF PREJUDICIAL ERROR AS TO HIM IN THE ADMISSION OF CERTAIN DOLLAR BILLS WITH WRITING THEREON ALLEGED TO BE BY HIM BUT WITHOUT ANY CONNECTION BEING SHOWN BETWEEN THESE BILLS AND THE ALLEGED CONSPIRACY.

THE FACTS

The facts relating to the admission of dollar bills and the error committed thereby can best be stated in the language of Judge McCamant, who wrote the opinion of the Circuit Court of Appeals. He said (Rec. 860-862):

> "Counsel for the Government in his opening statement to the jury said:
>
> > 'We will show you * * * that the individuals in San Francisco who were a part of this conspiracy * * * used a system of $1 bills to secure their cargo; that these bills were clipped in half, one-half being delivered to the captain or supercargo of the *Quadra,* and the other half going out in the small motor-boat that went to secure the particular load of cargo called for, these $1 bills having upon their back the list and order for the specific amount, and the kind of liquor that was to be secured from the *Quadra,* that when they got out there the bills were matched up, and when they were matched up the cargo was delivered to the particular motor-boat, and then they brought their cargo right in to San Francisco.'

"The Government proved that about Nov. 10, 1924, someone left eighty-three dollar bills at the Bank of Italy. These bills had been clipped in two and subsequently pasted together. The party having the mutilated bills had requested that they be exchanged for fresh money. It did not appear that Quartararo left them at the bank, but there was proof that endorsements on these bills were in the handwriting of Quartararo. With no other evidence connecting them up with the conspiracy these bills were received in evidence. There was an entire failure of proof as to the system by which business was transacted on the *Quadra* outlined in the opening statement.

"The bills contained endorsement of lists of liquor. The quantities of liquor listed on the bills were large, indicating that the party making the lists was trafficking in liquors. For example, one of the bills in Exhibit 31 contained on the front of the bill the following:

'10 Plymouth Gin
5 Royal George
5 Highland Queen
2 Drums Alcohol
Not to be filled,
only for record on order No. 15.'

"The endorsement on the back of this bill was:

'30 Burnett's Gin
45 Plymouth Gin'
—
75

"The bills were left with the bank about four weeks after the seizure and at a time when the conspiracy was at an end so far as the testimony shows. The effect of this testimony was not to

connect Quartararo with the conspiracy charged, but to create an inference that he was dealing in intoxicating liquors generally. *The writer believes that it was error to receive these bills in evidence, but error prejudicial to Quartararo only. The error was emphasized by a reference to the dollar bills in the charge of the Court. In the opinion of the writer the instruction requested by Quartararo withdrawing these bills from consideration by the jury should have been given. Terry vs. U. S.*, 7 F. (2d) 28. A majority of the Court think otherwise." (Italics ours.)

ARGUMENT

1. Although Eight Witnesses Were Examined or Cross-Examined by the Government as to the Alleged Method of Communicating Orders for Liquor from the Shore to the Ships at Sea, Not One Referred to the Dollar Bills.

Four witnesses were called by the prosecution, four men anxious to please the prosecution, who testified that they went out in small motor-boats to secure loads of cargo in connection with the alleged conspiracy. These men knew, if anyone on earth knew, the system, if any, by which they got their cargoes—and yet not a word was said by any of them even remotely touching these $1 bills.

In their order as produced by the Government, these four witnesses are as follows:

First: Magruder (Rec. 203-213), who, according to his own testimony, took the stand as a willing witness to tell *all* he knew about "this particular case." Long after the prosecution had these $1 bills in its possession, Magruder told the officials his story of his many trips in a motor-boat to obtain cargoes of liquor

and bring the same ashore—yet never a word about a dollar bill.

Second: Clance (Rec. 213 216), who testified before the Grand Jury, who gave a written statement to the prosecution, who was "willing to tell the Court and jury what I know about the facts of this case"—and who never uttered a word concerning any dollar bill.

Third: Sam Crivello, a defendant (Rec. 216-235), who long after the prosecution had these dollar bills, conferred with the prosecution and told them all he knew, who was angry because of Quartararo's refusal to help him after his arrest, who made the very trips claimed by the prosecution to be a part of this conspiracy, who admitted that he expected leniency in exchange for his testimony—and who said not a single word regarding the dollar bills.

Fourth: Marino Crivello (Rec. 252-263), also a defendant who expected leniency, who also conferred with the prosecution when these dollar bills were in its possession, and who also made the very trips claimed to be part of this conspiracy—and yet who gave no word of testimony regarding the dollar bills.

Four more witnesses were called, this time by the defense. These witnesses were on board the *Quadra* and were cross-examined at length by the prosecution concerning the liquor and the details of its delivery to the small boats. They were Harris, the chief officer on the *Quadra* (Rec. 330 to 401); Evelyn, second officer on the *Quadra* (Rec. 401-420); Gisbourne, who signed aboard the *Quadra* as an A. B. (Rec. 421-435); and Sargent, an oiler on the *Quadra* (Rec. 436-444), *and yet no dollar bill is mentioned.*

It is also significant that although the Government introduced in evidence a large number of papers, books

and documents seized on the *Quadra*, it produced no dollar bill from that vessel to substantiate its contention in regard to them. Nor did it produce any document referring to them directly or indirectly.

Furthermore, the Government contended that the bills were used to order liquor from the vessels at sea in this conspiracy. Yet of the 59 brands and kinds of liquor referred to on the dollar bills only 9 appear among the 53 brands and kinds of liquor appearing in the cargoes or cargo manifests seized and introduced in evidence in this case.

It is plain, therefore, that Judge McCamant was entirely correct in stating that the Government wholly failed to connect the dollar bills with the alleged conspiracy.

2. The Charge of the Trial Judge Aggravated the Error of Permitting the Evidence of the Dollar Bills to Go to the Jury.

In overruling the defendants' objection to the introduction of the dollar bills the trial court said:

> "It may be (later on) abundantly established, even to the satisfaction of you gentlemen (of the defense), that it (the dollar bill evidence) *does concern the immediate conspiracy charged. It may not; if not, I will properly instruct the jury.*" (Rec. 274.) (Italics and parentheses ours)

The court did not fulfill his promise. After that statement not a scintilla of evidence of any character was adduced by the Government to connect the dollar bills with the conspiracy. Therefore, following suggestion made by the trial court and in the absence of

evidence which the trial court in vain expected would be adduced, the defendant, Quartararo, proposed an instruction (Rec. 627) to the effect that these dollar bills be withdrawn from the consideration of the jury. Though this instruction was in entire accord with the previously expressed opinion of the trial judge, the instruction was nevertheless denied and an exception duly noted, as were motions to strike out the evidence. (Rec. 322-325.)

The instruction actually given by the trial judge was more injurious than no instruction at all. He said: (Rec. 608)

> "The Government has presented and the court has allowed in evidence here certain dollar bills. There is evidence here of an expert on the subject of handwriting who testifies that some of the writing at least on the back of those bills is in the handwriting of the defendant Quartararo. You must weigh the evidence of an expert in the same manner that you would the evidence of any other witness, etc. * * * Therefore, in determining whether or not you believe Mr. Quartararo wrote the list of liquor upon the back of these bills, you will weigh the testimony of Mr. Heinrich, etc. * * *"

The jury were thus led to understand that if they believed Quartararo to be the author of the writing on the bills, the bills were evidence of his complicity in the alleged conspiracy, although there was no evidence whatever to connect them with the conspiracy.

We respectfully submit that the grave and prejudicial error thus committed as to the defendant Quartararo is manifest and that the judgment as to him must be reversed.

PART VII

THE ADMISSION OF THE TELEGRAM OF JUNE 24, 1924, WITHOUT AUTHENTICATION AND WITHOUT CONNECTING IT WITH THE ALLEGED CONSPIRACY WAS PREJUDICIAL ERROR AS TO DEFENDANTS QUARTARARO AND BELANGER.

THE FACTS.

After both sides had rested, the prosecution asked leave to reopen its case for the introduction of new evidence. (Rec. 553, 554.) The jury was excluded for the first time during this trial. (Rec. 554.) Upon the Court's deciding to reopen the case the jury was recalled. (Rec. 562.)

The evidence offered and received over the objection of defendants (Rec. 565) was a typewritten telegram reading as follows (Rec. 565, 566):

"RUSH WIRE

"San Francisco, June 24/24.

"Geo. Norgan,
"Room 1052, Biltmore Hotel,
"Los Angeles, Calif.

"Merchandise not yet reached market. Therefore cannot report anything different. Stop. Have appointment with Vince to-morrow who will make proposition in morning. Things shaping good. Regards.

C. H."

Evidence was introduced by the Government to show that the telegram was received at the office of the Postal Telegraph Company at the St. Francis Hotel, San Francisco, and that it was sent over the wires. The

agent of the telegraph company took the name and address of the sender as "C. H. Belanger, Somerton Hotel." It appeared that Belanger was registered at the Somerton Hotel on the day when the wire was sent. This was as far as the Government went in authenticating the wire.

No evidence whatever was offered by the Government to show any connection between the telegram and the alleged conspiracy.

After the telegram was received in evidence the Court granted defendants a continuance of one week. At the end of this time defendants produced the witnesses Williams and Henry. (Rec. 566-584, 584-589.) They testified that Williams, Belanger, Quartararo and Norgan, the addressee of the telegram offered by the Government, were developing some oil properties in New Mexico and introduced correspondence dated April, 1924, relating thereto; that on June 22, 1924, Belanger and Norgan conferred with Williams relating to a payment which was to be made by the parties interested in the oil venture through Norgan when certain machinery purchased reached the New Mexico property; that the machinery was then en route; that it was agreed that Williams should notify Belanger when the property arrived and that Belanger would try to secure Quartararo's assistance in making the payment; that on June 23, 1924, Williams informed Belanger by telephone that the machinery had not yet arrived; and that Belanger stated that he would so inform Norgan. (Rec 566, 577.)

The action of the Court in permitting this telegram to be received in evidence and to go to the jury was properly raised as error. (Rec. 642, 647, 753, 754.)

The Circuit Court of Appeals sustained the action of the District Court. (Rec. 863-865.)

ARGUMENT

1. The Court Erred in Receiving the Telegram in Evidence Because It Was Not Authenticated.

A letter or telegram is not a self-proving instrument nor is there a presumption that it is sent by the party who purports to send it.

In *Sprinkle v. United States*, 150 Fed. 56, 59, the court said:

> "The letter, however, was admittedly not in his handwriting, and the government should, therefore, before it can use that which was in itself incompetent as evidence, either for the purpose of connecting Young with the commission of the crime, or to procure and sustain a verdict against him, establish its case with that degree of certainty necessary to a conviction with such letter excluded."

This principle is well stated as follows, in *Vol. 14, Encyc. of Evidence*, page 742:

> "Generally a letter is inadmissible unless shown to have been actually written or subscribed by the purported author, or at his direction, and that it was duly sent and received. And the same is true of a telegram."

The case of *Consolidated Grocery Co. v. Hammond* (5th Cir.) 175 Fed. 641, 645, holds:

> "A letter is not a self-proving instrument, and proof of some kind tending to show its genuineness is always required. The mere contents of a written communication purporting to be a particular person's, are, of themselves, not sufficient evidence of genuineness. * * * The statement in

> a letter offered that it is in answer to a letter previously received cannot, of itself, make the letter admissible. To so hold would make the statement in the letter prove the writing and posting of the previous letter, and also prove its own genuineness. That cannot be permitted."

See also *Smith v. Shoemaker*, 17 Wall. 630; *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618, 3 *Wigmore on Evidence*, Sec. 2131, p. 547.

The case of *Drexel v. True*, 74 Fed. 12, 13 (8th Cir.), holds:

> "The defendants offered in evidence two telegrams, one purporting to be sent by the defendant in error, Park Godwin, and the other purporting to be sent by S. Zeimer & Feldstein to Park Godwin. The defendant in error objected to the introduction in evidence of these telegrams, and the court excluded them. Waiving the consideration of other objections to their introduction, it is enough to say the defendant did not lay, or offer to lay, any foundation for their introduction. They did not show, or offer to show, that they were sent by the parties by whom they purported to be sent, or that they were received by the parties to whom they purported to be addressed. No offer was made to authenticate them in any manner whatever, and their genuineness was not admitted. They were, therefore, properly rejected."

The only effort at authentication made by the Government was to show that the agent of the Telegraph Company took the name and address of the sender as "C. H. Belanger, Somerton Hotel," and that Belanger was registered at that hotel. Clearly this was no evidence at all. If the name "C. H. Belanger" and address "Somerton Hotel" had been signed to the tele-

gram they would not have constituted any authentication thereof under the rules of evidence quoted above. The fact that these words were written by the clerk of the telegraph company does not give them any added weight but, on the contrary, lays the evidence open to the added objection of being the merest hearsay.

The Circuit Court of Appeals felt that "the circumstances were sufficient to constitute a *prima facie* authentication of the wire." In his treatise on *Evidence* (2nd Ed. Sec. 2494, Vol. 5, p. 459) Professor Wigmore in defining a *prima facie* showing adopts the language of Brett, J., in *Bridges v. R. Co.*, L. R. 7 H. L. 213, as follows:

> "Perhaps the *best* statement of the question is this: '(The proposition) cannot merely be, Is there evidence? * * * The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?' "

This view has been followed extensively in the United States. *Woodward v. Chicago, M. & St. P. R. R. Co.*, 145 Fed. 577; *Pittsburgh C. C. & St. Louis R. Co. v. Banfill*, 206 Ill. 553; *Donovan v. Connecticut Co.*, 86 Conn. 82.

Clearly there were no facts in evidence which the defendants were called upon to answer. If his name and address had appeared as a part of the telegram he would not have been called upon to answer or explain this fact upon authorities cited above. He was similarly not called upon to answer the hearsay testimony of the clerk who wrote his name and address on the

telegram. There was thus no *prima facie* authentication of the wire.

The subsequent testimony adduced by defendants did not tend to authenticate the telegram. Neither the witness Williams nor the witness Henry had anything to say about it. They testified solely as to the fact that Belanger, Quartararo and Norgan were about June 24, 1924, engaged in a financial transaction relating to certain oil properties.

The Circuit Court of Appeals apparently thought that this testimony authenticated the telegram within the decision in *DeWitt v. U. S.*, 291 Fed. 995, 1002. But the case cited is radically different from the present situation. There an objection was made to the introduction of evidence of certain telephone calls. The defendant later admitted that he had made calls during the period mentioned and with the people mentioned, but attempted to deny their damaging effect. There is no such admission in the present case. The telegram therefore remained wholly unauthenticated and should have been withdrawn from the consideration of the jury.

2. The Telegram Was Not Shown In Any Way to Have Been Connected With the Alleged Conspiracy.

The Government contended that the word "merchandise" appearing in the telegram referred to liquor and that "Vince" referred to Vincent Quartararo. Even this contention if true does not show any connection between the telegram and the alleged conspiracy. For it was not shown that any liquor had failed to reach a market on June 24, 1924, or any other time or that Norgan was playing any part in the alleged conspiracy.

But the Government's contention was contrary to the only evidence relating to the relations in June, 1924, between Belanger and Norgan which was in the record. They were shown to have been an oil project and in connection with that project money was to be paid by Belanger and his associates, he hoped with the assistance of Quartararo, through Norgan when certain machinery reached the oil field. Thus the only evidence in the record negatived the wholly gratuitous assumption made by the Government that in a telegram from Belanger to Norgan the word "merchandise" referred to liquor.

We have already pointed out in Part V above the error of receiving in a conspiracy trial evidence not shown to be connected with the conspiracy developed by the Government's proof.

That the telegram—particularly under the circumstances in which it was introduced—was prejudicial to the two defendants concerned, cannot be doubted.

The language of *Sparks vs. Territory of Oklahoma*, 146 Fed. 371, is particularly pertinent:

> "Every litigant has the legal right to a fair and impartial trial of the issues which his case presents according to the law and the evidence applicable to those issues alone. The submission to the jury for their consideration of extraneous issues, or of evidence which is neither relevant nor material to the questions upon trial, is a violation of this right, and it constitutes a fatal error, because it tends to withdraw the attention of the jury from the issues actually involved, and to lead them to decide the case upon false issues, and in that way to reach an erroneous result."

The principle that the erroneous admission of evidence against an accused in a Federal Court will be

presumed to have been prejudicial unless it is made to appear beyond a doubt that it was harmless, is supported by the following cases:

Deery v. Cray, 5 Wall. 795, 807.
Sprinkle vs. U. S., 150 Fed. 56.
Williams v. U. S., 158 Fed. 56.
Gilmer v. Higley, 110 U. S. 47.
Boston R. R. Co. v. O'Reilly, 158 U. S. 334, 337.
U. S. v. Daubner (D. C.) 17 Fed. 793.
Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668.

The effect of the admission of such testimony is pointed out by Justice Harlan of the U. S. Supreme Court in *Boyd vs. U. S.*, 142 U. S. 450, 458.

> "Proof of them only tended to prejudice the defendants with the jury, to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged."

See also:

Ford vs. U. S., 259 Fed. 552.
Crowley vs. U. S., 8 Fed. (2d) 119, (9th Cir.)
Heitman vs. U. S., 5 Fed. (2d) 889 (9th Cir.)
Beyer vs. U. S., 282 Fed. 227 (3d Cir.)
Thompson vs. U. S., 283 Fed. 896 (3d Cir.)
Carpenter vs. U. S., 280 Fed. 600 (9th Cir.)
Kepl vs. U. S., 299 Fed. 591 (9th Cir.)
Fish vs. U. S., 215 Fed. 549 (1st Cir.)

We, therefore, respectfully submit that the error of the admission of this telegram prejudiced the defendants Belanger and Quartararo, and for this reason the judgments as to them must be reversed.

CONCLUSION.

For the reasons set forth at length above in Parts I to VII, inclusive, we respectfully submit that the verdicts and judgments against the defendants, Ford, Harris, Evelyn, Quartararo and Belanger, were erroneous and should be reversed.

Respectfully submitted,

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